

DECISIONS
OF THE DEPARTMENT OF THE INTERIOR
IN
CASES RELATING TO
THE PUBLIC LANDS

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DECISIONS
RELATING TO
THE PUBLIC LANDS.

RESTORATION OF LOST OR OBLITERATED CORNERS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 1, 1909.

1. The increasing number of letters from county and local surveyors received at this office making inquiry as to the proper method of restoring to their original position lost or obliterated corners marking the survey of the public lands of the United States, or such as have been willfully or accidentally moved from their original position, have rendered the preparation of the following general rules necessary, particularly as in a very large number of cases the immediate facts necessary to a thorough and intelligent understanding are omitted. Moreover, surveys having been made under the authority of different acts of Congress, different results have been obtained, and no special law has been enacted by that authority covering and regulating the subject of the above-named inquiries. Hence, the general rule here given must be considered merely as an expression of the opinion of this office on the subject, based, however, upon the spirit of the several acts of Congress authorizing the surveys, as construed by this office, and by United States court decisions. When cases arise which are not covered by these rules, and the advice of this office is desired, the letter of inquiry should always contain a description of the particular corner, with reference to the township, range, and section of the public surveys, to enable this office to consult the record.

2. An obliterated corner is one where no visible evidence remains of the work of the original surveyor in establishing it. Its location may, however, have been preserved beyond all question by acts of

landowners, and by the memory of those who knew and recollect the true situs of the original monument. In such cases it is not a lost corner.

A lost corner is one whose position can not be determined, beyond reasonable doubt, either from original marks or reliable external evidence.

Surveyors sometimes err in their decision whether a corner is to be treated as lost or only obliterated.

3. Surveyors who have been United States deputies should bear in mind that in their private capacity they must act under somewhat different rules of law from those governing original surveys, and should carefully distinguish between the provisions of the statute which guide a government deputy and those which apply to retracement of lines once surveyed. The failure to observe this distinction has been prolific of erroneous work and injustice to landowners.

4. To restore extinct boundaries of the public lands correctly, the surveyor must have some knowledge of the manner in which townships were subdivided by the several methods authorized by Congress. Without this knowledge he may be greatly embarrassed in the field, and is liable to make mistakes invalidating his work, and leading eventually to serious litigation.

5. Various regions of this country were surveyed under different sets of instructions issued at periods ranging from 1785 to the present time. The earliest rules were given to deputy surveyors in manuscript or in printed circulars, and no copies are available for distribution.

Regulations more in detail, improving the system for greater accuracy and permanency, were issued in book form, editions of 1855, 1871, 1890, 1894, and 1902. The supply of copies of these is exhausted, except the latest, which is now sold at cost to unofficial applicants by the Superintendent of Documents.

6. The chief acts of Congress authorizing and regulating public-land surveys are summarized below to enable anyone to consult the full record thereof for explanation of difficult questions regarding early surveys.

7. Compliance with the provisions of congressional legislation at different periods has resulted in two sets of corners being established on township lines at one time; at other times three sets of corners have been established on range lines; while the system now in operation makes but one set of corners on township boundaries, except on standard lines—i. e., base and correction lines, and in some exceptional cases.

The following brief explanation of the modes which have been practiced will be of service to all who may be called upon to restore obliterated boundaries of the public-land surveys:

Where two sets of corners were established on township boundaries, one set was planted at the time the exteriors were run, those on the north boundary belonging to the sections and quarter sections north of said line, and those on the west boundary belonging to the sections and quarter sections west of that line. The other set of corners was established when the township was subdivided. This method, as stated, resulted in the establishment of two sets of corners on all four sides of the township.

Where three sets of corners were established on the range lines, the subdivisional surveys were made in the above manner, except that the east and west section lines, instead of being closed upon the corners previously established on the east boundary of the township, were run due east from the last interior section corner, and new corners were erected at the points of intersection with the range line.

8. The method now in practice, where regular conditions are found, requires section lines to be initiated at the corners on the south boundary of the township, and to close on existing corners on the east, north, and west boundaries of the township, except that when the north boundary is a base line or standard parallel, new corners are set thereon, called closing corners. But in some cases, for special reasons, an opposite course of procedure has been followed, and subdivisional work has been begun on the north boundary and has been extended southward.

9. For the above reasons it is evident that a subsequent surveyor ought not to perform field work without knowing all the facts of the original survey, lest there be unsuspected duplication of official corners, leading him to use the wrong one in his survey. Upon township and range lines it is often necessary to procure copies of the plats of surveys on both sides, in order to become certain of the necessary understanding of the case, as required in section 57 of this circular. A great many township plats fail to show the second set of corners, established in the survey of an adjoining township, subsequent to the plat of the former township.

10. In the more recent general instructions greater care has been exercised to secure rectangular subdivisions by fixing a strict limitation that no new township exteriors or section lines shall depart from a true meridian or east and west line more than twenty-one minutes of arc; and that where a random line is found liable to correction beyond this limit, a true line on a cardinal course must be run, setting a closing corner on the line to which it closes.

This produces, in new surveys closing to irregular old work, a great number of exteriors marked by a double set of corners. All retracing surveyors should proceed under these new conditions with full knowledge of the field notes and exceptional methods of subdivision.

SYNOPSIS OF ACTS OF CONGRESS.

11. The first enactment in regard to the surveying of the public lands was an ordinance passed by the Congress of the Confederation May 20, 1785, prescribing the mode for the survey of the "Western Territory," and which provided that said territory should be divided into "townships of six miles square, by lines running due north and south, and others crossing them at right angles" as near as might be.

Ordinance of the Congress of the Confederation of May 20, 1785. U. S. Land Laws, p. 349, edition 1828.

It further provided that the first line running north and south should begin on the Ohio River at a point due north from the western terminus of a line run as the south boundary of the State of Pennsylvania, and the first line running east and west should begin at the same point and extend through the whole territory. In these initial surveys only the exterior lines of the townships were surveyed, but the plats were marked by subdivisions into sections 1 mile square, numbered from 1 to 36, commencing with No. 1 in the southeast corner of the township, and running from south to north in each tier to No. 36 in the northwest corner of the township; mile corners were established on the township lines. The region embraced by the surveys under this law forms a part of the present State of Ohio, and is generally known as "the Seven Ranges."

12. The Federal Congress passed a law, approved May 18, 1796, in regard to surveying the public domain, which applied to "the territory northwest of the River Ohio, and above the mouth of the Kentucky River."

Act of May 18, 1796. U. S. Statutes at Large, vol. 1, p. 465. Section 2395, U. S. Revised Statutes.

Section 2 of said act provided for dividing such lands as had not been already surveyed or disposed of "by north and south lines run according to the true meridian, and by others crossing them at right angles, so as to form townships of six miles square," etc. It also provided that "one-half of said townships, taking them alternately, should be subdivided into sections containing, as nearly as may be, 640 acres each, by running through the same each way parallel lines at the end of every two miles; and by marking a corner on each of said lines at the end of every mile." The act also provided that "the sections shall be numbered, respectively, beginning with the number one in the northeast section, and proceeding west and east alternately through the township, with progressive numbers till the thirty-sixth be completed." This method of numbering sections is still in use.

13. An act amendatory of the foregoing, approved May 10, 1800, required the "townships west of the Muskingum, which are directed to be sold in quarter townships, to be subdivided into half sections of 320 acres each, as nearly as may be, by running parallel lines through the same from east to west, and from south to north, at the distance of one mile from each other, and marking corners, at

Act of May 10, 1800. U. S. Statutes at Large, vol. 2, p. 73. Section 2395, U. S. Revised Statutes.

the distance of each half mile on the lines running from east to west, and at the distance of each mile on those running from south to north. And the interior lines of townships intersected by the Muskingum, and of all townships lying east of that river, which have not been heretofore actually subdivided into sections, shall also be run and marked * * *. And in all cases where the exterior lines of the townships thus to be subdivided into sections or half sections, shall exceed or shall not extend six miles, the excess or deficiency shall be specially noted, and added to or deducted from the western or northern ranges of sections or half sections in such townships, according as the error may be in running the lines from east to west or from south to north." Said act also provided that the northern and western tiers of sections should be sold as containing only the quantity expressed on the plats, and all others as containing the complete legal quantity.

14. The act approved June 1, 1796, "regulating the grants of land appropriated for military services," etc., provided for dividing the "United States Military Tract," in the State of Ohio, into townships 5 miles square, each to be subdivided into quarter townships containing 4,000 acres.

Act of June 1, 1796.
U. S. Statutes at
Large, vol. 1, p. 490.

15. Section 6 of the act approved March 1, 1800, amendatory of the foregoing act, enacted that the Secretary of the Treasury was authorized to subdivide the quarter townships into lots of 100 acres, bounded as nearly as practicable by parallel lines 160 perches in length by 100 perches in width. These subdivisions into lots, however, were made upon the plats in the office of the Secretary of the Treasury, and the actual survey was only made at a subsequent time when a sufficient number of such lots had been located to warrant the survey. It thus happened, in some instances, that when the survey came to be made the plat and survey could not be made to agree, and that fractional lots on plats were entirely crowded out. A knowledge of this fact may explain some of the difficulties met with in the district thus subdivided.

Act of March 1, 1800.
U. S. Statutes at
Large, vol. 2, p. 14.

16. The act of greatest importance to the work of all retracing surveyors is the one approved February 11, 1805, which is still in force, as reenacted by revision in 1873. It directs the subdivision of public lands into quarter-sections, and sets forth three principles for ascertaining the boundaries and contents of tracts of public land, after survey, in substance as follows:

Act of February 11,
1805. U. S. Statutes
at Large, vol. 2, p.
313. Section 2396, U.
S. Revised Statutes.

17. (a) All corners marked in the surveys returned by the surveyor-general shall be established as the proper corners of the sections or quarter-sections which they were intended to designate, and corners of half and quarter sections not marked shall be placed as nearly as possible "equidistant from those two corners which stand on the same line."

18. (b) "The boundary lines actually run and marked" (in the field) "shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended, and the length of such lines as returned by either of the surveyors aforesaid shall be held and considered as the true length thereof. And the boundary lines which shall not have been actually run and marked as aforesaid shall be ascertained by running straight lines from the established corners to the opposite corresponding corners, but in those portions of the fractional townships where no such opposite or corresponding corners have been or can be fixed, the said boundary lines shall be ascertained by running from the established corners due north and south" (see secs. 67 and 79) "or east and west lines, as the case may be, to the water course, Indian boundary line, or other external boundary of such fractional township."

19. (c) "Each section, or subdivision of section, the contents whereof shall have been returned by the surveyor-general, shall be held and considered as containing the exact quantity expressed in such return; and the half-sections and quarter-sections, the contents whereof shall not have been thus returned, shall be held and considered as containing the one-half or the one-fourth part, respectively, of the returned contents of the section of which they may make part."

20. These three principles were clearly designed for the purpose of establishing beyond dispute all lines and monuments of accepted official surveys and of placing a statutory limitation against attempts to alter the same, or to set up complaints of deficiency of area as a basis for resurvey.

PENALTIES FOR REMOVAL OF MONUMENTS.

21. Several of the States have passed laws prescribing penalties for the destruction or removal of United States survey corners, and the act of Congress quoted on page 2 relates to such destruction or removal in all the States and Territories. Any person having knowledge of a violation of the law last mentioned may present legal evidence thereof to the United States attorney for the district in which the land lies, and request the prosecution of the offender. Should any such attorney improperly refuse to take action, the matter may be called to the attention of the Department of Justice, Washington, D. C.

22. The act of Congress approved April 24, 1820, provides for the sale of public lands in half-quarter sections, and requires that "in every case of the division of a quarter section the line for the division thereof shall run north and south," "and fractional sections, containing 160 acres and upwards, shall in like manner, as nearly as practicable, be subdivided into half quarter sections, under such rules

Act of April 24, 1820.
U. S. Statutes at
Large, vol. 3, p. 566.
Section 2397, U. S.
Revised Statutes.

and regulations as may be prescribed by the Secretary of the Treasury; but fractional sections containing less than 160 acres shall not be divided."

23. The act of Congress approved May 24, 1824, provides "that whenever, in the opinion of the President of the United States, a departure from the ordinary mode of surveying land on any river, lake, bayou, or water course would promote the public interest, he may direct the surveyor-general in whose district such land is situated, and where the change is intended to be made, under such rules and regulations as the President may prescribe, to cause the lands thus situated to be surveyed in tracts of two acres in width, fronting on any river, bayou, lake, or water course, and running back the depth of forty acres."

Act of May 24, 1824.
U. S. Statutes at
Large, vol. 4, p. 34.

24. The act of Congress approved April 5, 1832, directed the subdivision of the public lands into quarter-quarter sections; that in every case of the division of a half-quarter section the dividing line should run east and west, and that fractional sections should be subdivided, under regulations prescribed by the Secretary of the Treasury. Under the latter provision the Secretary directed that fractional sections containing less than 160 acres, or the residuary portion of a fractional section, after the subdivision into as many quarter-quarter sections as it is susceptible of, may be subdivided into lots, each containing the quantity of a quarter-quarter section as nearly as practicable, by so laying down the line of subdivision that they shall be 20 chains wide, which distances are to be marked on the plat of subdivisions, as are also the areas of the quarter-quarters and residuary fractions.

Act of April 5, 1832.
U. S. Statutes at
Large, vol. 4, p. 508.
Section 2397, U. S.
Revised Statutes.

These two acts last mentioned provided that the corners and contents of half-quarter and quarter-quarter sections should be ascertained as nearly as possible in the manner and on the principles prescribed in the act of Congress approved February 11, 1805.

GENERAL RULES.

25. From the foregoing synopsis of congressional legislation it is evident—

First. That the boundaries of the public lands established and returned by the duly appointed government surveyors, when approved by the surveyors-general and accepted by the Government, are unchangeable.

Second. That the original township, section, and quarter-section corners established by the government surveyors must stand as the true corners which they were intended to represent, whether the corners be in the place shown by the field-notes or not.

Third. That quarter-quarter corners not established by the government surveyors shall be placed on the straight lines joining the section and quarter-section corners and midway between them, except on the last half mile of section lines closing on the north and west boundaries of the township, or on other lines between fractional sections.

Fourth. That all subdivisional lines of a section running between corners established in the original survey of a township must be straight lines, running from the proper corner in one section line to its opposite corresponding corner in the opposite section line. (See secs. 75 to 82.)

Fifth. That in a fractional section where no opposite corresponding corner has been or can be established, any required subdivision line of such section must be run from the proper original corner in the boundary line as nearly due east and west, or north and south, as the case may be, to the water course, Indian reservation, or other boundary of such section, as due parallelism to section lines will permit, under the modifying rule in sec. 79.

26. From the foregoing it will be plain that extinct corners of the government surveys must be restored to their original locations, whenever it is possible to do so; and hence resort should always be first had to the marks of the survey in the field. The locus of the missing corner should be first identified on the ground by the aid of the mound, pits, line trees, bearing trees, etc., described in the field notes of the original survey.

27. The identification of mounds, pits, buried memorials, witness trees, or other permanent objects noted in the field notes of survey, affords the best means of relocating the missing corner in its original position. If this can not be done, clear and convincing testimony of citizens as to the place it originally occupied should be taken, if such can be obtained. In any event, whether the locus of the corner be fixed by the one means or the other, such locus should always be tested and confirmed by measurements to known corners. No definite rule can be laid down as to what shall be sufficient evidence in such cases, and much must be left to the skill, fidelity, and good judgment of the surveyor in the performance of his work.

28. Actions or decisions by county surveyors which may result in changes of boundaries of tracts of land and involve questions of ownership in connection therewith, are subject to review by the local courts in proceedings instituted in accordance with the local statutes governing such matters. *

EXCEPTIONAL CASES.

29. When new measurements are made on a single line to determine the position thereon for a restored lost corner (for example, a quarter-section corner on line between two original section corners),

or when new measurements are made between original corners on two lines for the purpose of fixing by their intersection the position of a restored missing corner (for example, a corner common to four sections of four townships), it will almost invariably happen that discrepancies will be developed between the new measurements and the original measurements in the field notes. When these differences occur the surveyor will in all cases establish the missing corner by proportionate measurements (see secs. 49, 83, 84, and 85) on lines conforming to the original field notes and by the method followed in the original survey. From this rule there can be no departure, since it is the basis upon which the whole operation depends for accuracy and truth.

30. In cases where the relocated corner can not be made to harmonize with the field notes in all directions, and unexplained discrepancy in the original survey is apparent, it sometimes becomes the task of the surveyor to place it according to the requirements of one line and against the calls of another line. For instance, if the line between sections 30 and 31, reported 78 chains long, would draw the missing corner on range line 1 chain eastward out of range with the other exterior corners, the presumption would be strong that the range line had been run straight and the length of the section line wrongly reported, because experience shows that west random lines are regarded as less important than range lines and more liable to error.

31. Again, where a corner on a standard parallel has been obliterated, it is proper to assume that it was placed in line with other corners, and if an anomalous length of line reported between sections 3 and 4 would throw the closing corner into the northern township, a surveyor would properly assume that the older survey of the standard line is to control the length of the later and minor line. The marks or corners found on such a line closing to a standard parallel fix its location, but its length should be limited by its actual intersection, at which point the lost closing corner may be placed.

32. The strict rule of the law that "all corners marked in the field shall be established as the corners which they were intended to designate," and the further rule that "the length of lines returned by the surveyors shall be held and considered as the true length thereof," are found in some cases to be impossible of fulfillment in all directions at once, and a surveyor is obliged to choose, in his own discretion, which of two or more lines must yield, in order to permit the rules to be applied at all.

33. In a case of an erroneous but existing closing corner, which was set some distance out of the true state boundary of Missouri and Kansas, it was held by this office that a surveyor subdividing the fractional section should preserve the boundary as a straight line, and should not regard said closing corner as the proper corner of the ad-

jacent fractional lots. The said corner was considered as fixing the position of the line between two fractional sections, but that its length extended to a new corner to be set on the true boundary line. The surveyor should therefore preserve such an original corner as evidence of the line; but its erroneous position should not be allowed to cause a crook between mile corners of the original state boundary. It is only in cases where it is manifestly impossible to carry out the literal terms of the law that a surveyor can be justified in making such a decision.

34. The principle of the preponderance of one line over another of less importance has been recognized in the rule for restoring a section corner common to two townships, in former editions of this circular. The new corner should be placed on the township line; and measurements to check its position by distances to corners within the townships are useful to confirm it if found to agree well, but should not cause it to be placed off the line if found not to agree, if the general condition of the boundary supports the presumption that it was properly aligned.

MAGNETIC DECLINATION.

35. The subject of the "variation," formerly deemed most important in surveys, is mentioned here only to advise against its use as a basis for the location of any lost line, though it may be a temporary guide in a preliminary search for old evidences. Its importance is greatly overrated, from lack of knowledge of the actual practice of surveyors, in the days when both their instruments and their knowledge were more primitive.

36. The General Land Office prohibits its employees and contracting surveyors from depending to any extent on courses derived from the needle. It also declines to advise other surveyors what variation to use in their own regions, for evident reasons, as follows:

The amount of local magnetism can not truly be determined by any process of mere calculation.

The secular change of declination reported at some distant time and place is no safe guide to the fact at any other station or period.

The variation recorded in old work may have been quite incorrect, as large contracts were sometimes executed by assuming a variation, from hearsay or estimation, and without due verification.

The needle is not only subject to daily and yearly change, but is also liable to defects in the instrument, so that different compasses may run different courses.

37. Another serious cause of distrust is found in the authorized rules followed in early surveys, down to the year 1864, under which a vast amount of public land was surveyed with a record showing variations which were openly inconsistent, and which should here be explained.

Before 1864, in running random and true section lines, it was required to make the record of courses on the ancient plan shown by this example: East on a random line between sections 1 and 12. Variation $13^{\circ} 15' E.$ (falling perhaps 42 links north of objective corner). West on true line between sections 1 and 12. Variation $13^{\circ} 33' E.$, etc., thus representing the "corrected" course by a nominal change of variation; whereas, after the instructions of 1864, the record would truly show the change to have been, not in the variation, but in the course, thus: N. $89^{\circ} 42' W.$ on a true line, etc.

Therefore, in a large portion of the early records, the words "east" and "west" in such connection were only approximate, while by the present system the true course is intended.

38. Terrestrial magnetism, the cause of "variation," is a fluctuating quantity, subject to unexplained changes. But since all qualified surveyors and engineers of this day are competent to make the requisite astronomical observations to determine true courses, surveying by the needle is not recommended.

MARKS ON MONUMENTS OF SURVEY.

39. Inquiries are often made to learn the meaning of the marks on corner stones. It is not practicable here to give an abstract of all the markings used in full compliance with the manual; but the following notes will suffice to explain ordinary cases:

Notches made on the east and south angles of an interior section corner indicate how many miles it is from the east and south lines of a full township; and by using the plan of a township plat, the numbers of the sections about the given corner stone will be known. In fractional townships, marks show the sections the same as if the boundaries were complete.

40. Observe that there are cases of irregular subdivision, where the stone or post is a corner of two townships or two sections only; also that stones may have been sometimes overthrown or turned around to a new and improper position.

41. On township and range lines grooves cut in the stone or post on opposite sides show distances to exterior corners of the township. Thus, two grooves on the south and four on the north indicate a corner of sections 19, 24, 25, and 30.

42. "W C" upon a monument means a witness corner, placed not at the true corner point (which may be in water or otherwise impracticable), but established elsewhere on safe ground at a distance and course shown by the official field notes and plats.

"M C" shows a meander corner, placed either on an exterior or section line at any certain distance from a section corner as shown by the plat.

43. "S C" denotes a standard corner—that is, a regular corner on a standard parallel—belonging to two sections on the north side, with a closing corner (marked C C) somewhere east or west of it, belonging to two sections on the south side of the parallel. The letters C C are also used in many other situations, where a regular line closed upon a boundary of a State, a reservation, or a private land claim.

44. Post corners and bearing trees (B T) have marks that are self-explanatory. Two chops or notches on the two opposite sides of a tree indicate that it stood upon the original line when surveyed. Such are called "line trees," and are thus distinguished from trees merely blazed near the line.

Full instructions as to the construction, marking, and differentiation of the 108 kinds of corner monuments are given in the Manual of Surveying Instructions. These should be consulted, in connection with a correct copy of the original field notes, in case of difficulty.

TO RESTORE LOST OR OBLITERATED CORNERS.

45. To restore corners on base lines and standard parallels.—Lost or obliterated standard corners will be restored to their original positions on a base line, standard parallel, or correction line, by proportionate measurements on the line, conforming as nearly as practicable to the original field notes and joining the nearest identified original standard corners on opposite sides of the missing corner or corners, as the case may be.

46. The term "standard corners" will be understood to designate standard township, section, quarter section, and meander corners; and, in addition, closing corners, in the following cases: Closing corners used in the original survey to determine the position of a standard parallel, or established during the survey of the same, will, with the standard corners, govern the alinement and measurements made to restore lost or obliterated standard corners; but no other closing corners will control in any manner the restoration of standard corners on a base line or standard parallel.

47. A lost or obliterated closing corner from which a standard parallel has been initiated or to which it has been directed will be reestablished in its original place by proportionate measurement from the corners used in the original survey to determine its position. Measurements from corners on the opposite side of the parallel will not control in any manner the relocation of said corner.

48. A missing closing corner originally established during the survey of a standard parallel as a corner from which to project surveys south will be restored to its original position by considering it a standard corner and treating it accordingly.

49. Therefore, paying attention to the preceding explanations, we have for the restoration of one or several corners on a standard par-

allel, and for general application to all other surveyed lines, the following proportion:

As the original field-note distance between the selected known corners is to the new measure of said distance so is the original field-note length of any part of the line to the required new measure thereof.

The sum of the computed lengths of the several parts of a line must be equal to the new measure of the whole distance.

50. As has been observed, existing original corners can not be disturbed; consequently discrepancies between the new and the original field-note measurements of the line joining the selected original corners will not in any manner affect measurements beyond said corners, but the differences will be distributed proportionately to the several intervals embraced in the line in question.

After having checked each new location by measurement to the nearest known corners, new corners will be established permanently and new bearings and measurements taken to prominent objects, which should be of as permanent a character as possible, and the same recorded for future reference.

51. Restoration of township corners common to four townships.—Two cases should be clearly recognized: First, where the position of the original township corner has been made to depend upon measurements on two lines at right angles to each other. Second, where the original corner has been located by measurements on one line only; for example, on a guide meridian.

52. For restoration of a township corner originally subject to the first condition: A line will first be run connecting the nearest identified original corners on the meridional township lines, north and south of the missing corner, and a temporary corner will be placed at the proper proportionate distance. This will determine the corner in a north and south direction only.

Next, the nearest original corners on the latitudinal township lines will be connected and a point thereon will be determined in a similar manner, independent of the temporary corner on the meridional line. Then through the first temporary corner run a line east (or west) and through the second temporary corner a line north (or south), as relative situations may suggest. The intersection of the two lines last run will define the position of the restored township corner, which may be permanently established.

53. The restoration of a lost or obliterated township corner established under the second condition, i. e., by measurements, on a single line, will be effected by proportionate measurements on said line, between the nearest identified original corners on opposite sides of the missing township corner, as before described.

54. Reestablishment of corners common to two townships.—The two nearest known corners on the township line, the same not being a base or a correction line, will be connected, as shown in sections 45 to 50, by a right line, and the missing corner established by proportionate distance as directed in that case; the location thus found will be checked upon by measurements to nearest known section or quarter-section corners north and south, or east and west, of the township line, as the case may be, to obtain approximate though probably not exact verification of original distances.

55. Reestablishment of closing corners.—Measure from the quarter-section, section, or township corner east or west, as the case may be, to the next preceding or succeeding corner in the order of original establishment, and reestablish the missing closing corner by proportionate measurement. The line upon which the closing corner was originally established should always be remeasured, in order to check upon the correctness of the new location. (See secs. 29 to 34 and 64 to 66 for details.)

56. Reestablishment of interior section corners.—This class of corners should be reestablished in the same manner as corners common to four townships. In such cases, when a number of corners are missing on all sides of the one sought to be reestablished, the entire distance must, of course, be remeasured between the nearest existing recognized corners both north and south, and east and west, in accordance with the rule laid down, and the new corner reestablished by proportionate measurement. The mere measurement in any one of the required directions will not suffice, since the direction of the several section lines running northward through a township, or running east and west, are only in the most exceptional cases true prolongations of the alinement of the section lines initiated on the south boundary of the township; while the east and west lines running through the township, and theoretically supposed to be at right angles with the former, are seldom in that condition, and the alinements of the closing lines on the east and west boundaries of the township, in connection with the interior section lines, are even less often in accord. Moreover, the alinement of the section line itself from corner to corner, in point of fact, also very frequently diverges from a right line, although presumed to be such from the record contained in the field notes and so designated on the plats, and becomes either a broken or a curved line. This fact will be determined, in a timbered country, by the blazes which may be found upon trees on either side of the line, and although such blazed line will not strictly govern as to the absolute direction assumed by such line, it will assist very materially in determining its approximate direction, and should never be neglected in retracements for the reestablishment of lost corners of any description. Sight or line trees described in the field notes, together

with the recorded distances to same, when fully identified, will, it has been held in one or more States, govern the line itself, even when not in a direct or straight line between established corners, which line is then necessarily a broken line by passing through said sight trees. Such trees, when in existence and properly identified beyond a question of doubt, will very materially assist in evidencing the correct relocation of a missing corner. It is greatly to be regretted that the earlier field notes of survey are so very meager in the notation of the topography found on the original line, which might in very many instances materially lessen a surveyor's labors in retracement of lines and reestablishment of the required missing corner. In the absence of such sight trees and other evidence regarding the line, as in an open country, or where such evidence has been destroyed by time, the elements, or the progress of improvement, the line connecting the known corners should be run straight from corner to corner.

57. Reestablishment of quarter-section corners on township boundaries.—Only one set of quarter-section corners are actually marked in the field on township lines, and they are established at the time when the township exteriors are run. When double section corners are found, the quarter-section corners are considered generally as standing midway between the corners of their respective sections, and when required to be established or reestablished, as the case may be, they should be generally so placed; but great care should be exercised not to mistake the corners belonging to one township for those of another. After determining the proper section corners marking the line upon which the missing quarter-section corner is to be reestablished and measuring said line, the missing quarter-section corner will be reestablished in accordance with the requirements of the original field notes of survey, by proportionate measurement between the section corners marking the line.

58. Where there are double sets of section corners on township and range lines and the quarter-section corners for sections south of the township or east of the range lines are required to be established in the field, the said quarter-section corners should be so placed as to suit the calculation of areas of the quarter sections adjoining the township boundaries as expressed upon the official township plat, adopting proportionate measurements when the present measurement of the north and west boundaries of the sections differs from the original measurement.

59. Reestablishment of quarter-section corners on closing section lines between fractional sections.—This class of corners must be reestablished proportionately, according to the original measurement of 40 chains from the last interior section corner. If the whole measurement does not agree with the original survey, the excess or deficiency must be divided proportionately between the two distances expressed

in the field notes of original survey. The section corner started from and the corner closed upon should be connected by a right line, unless the retracement should develop the fact that the section line is either a broken or curved line, as is sometimes the case.

60. Reestablishment of interior quarter-section corners.—In some of the older surveys these corners are placed at variable distances, in which case the field notes of the original survey must be consulted, and the quarter-section corner reestablished at proportionate distances between the corresponding section corners, in accordance therewith. The later surveys being more uniform and in stricter accordance with law, the missing quarter-section corner must be reestablished equidistant between the section corners marking the line, according to the field notes of the original survey. The remarks made under section 56, in relation to section lines, apply with full force here also; the caution there given not to neglect sight trees is equally applicable, since the proper reestablishment of the quarter-section corner may in some instances very largely depend upon its observance, and avoid one of the many sources of litigation.

61. NOTE.—In some of the southern public-land States it was the custom in the early surveys to establish half-mile posts at a distance of 40 chains from the point from which the section line was initiated, at the same time inserting in the field notes at the midway point " $\frac{1}{4}$ sec. cor." without indication in the field notes that any other corner than the half-mile corner was set. And it is presumed that the $\frac{1}{4}$ sec. cor. was merely "called for" at that place. This practice has long been discontinued owing to the confusion thereby occasioned.

These half-mile posts have no bearing upon the subdivision of the section except where they happen to occupy the midway point on true lines between section corners. In such cases, when a subdivision is required of a section surveyed on this plan, and no original quarter corners are found, the latter should be reestablished at a point on a true line midway between the original section corners.

62. Where double corners were originally established, one of which is standing, to reestablish the other.—It being remembered that the corners established when the exterior township lines were run, belong to the sections in the townships north and west of those lines, the surveyor must first determine beyond a doubt to which sections the existing corner belongs. This may be done by testing the courses and distances to witness trees or other objects noted in the original field notes of survey, and by remeasuring distances to known corners. Having determined to which township the existing corner belongs, the missing corner may be reestablished in line from the existing corner, at the distance stated in the field notes of the original survey, by proportionate measurement, and tested by retracement to the opposite corresponding corner of the section to which the missing section

corner belongs. These double corners being generally not more than a few chains apart, the distance between them can be more accurately laid off, and it is considered preferable to first establish the missing corner as above, and check upon the corresponding interior corner as noted in section 54 above.

63. Where double corners were originally established, and both are missing, to reestablish the one established when the township line was run.—The surveyor will connect the nearest known corners on the township line by a right line, being careful to distinguish the section from the closing corners, and reestablish the missing corner at the point indicated by the field notes of the original survey by proportionate measurement. The corner thus restored will be common to two sections either north or west of the township boundary, and the section north or west, as the case may be, should be carefully retraced, thus checking upon the reestablished corner, and testing the accuracy of the result. It can not be too much impressed upon the surveyor that any measurements to objects on line noted in the original survey are means of determining and testing the correctness of the operation.

64. Where double corners were originally established, and both are missing, to reestablish the one established when the township was subdivided.—The corner to be reestablished being common to two sections south or east of the township line, the section line closing on the missing section corner should be first retraced to an intersection with the township line in the manner previously indicated, and a temporary corner established at the point of intersection. The township line will of course have been previously carefully retraced in accordance with the requirements of the original field notes of survey, and marked in such a manner as to be readily identified when reaching the same with the retraced section line. The location of the temporary corner planted at the point of intersection will then be carefully tested and verified by remeasurements to objects and known corners on the township line, as noted in the original field notes of survey, and the necessary corrections made in such relocation. Should unusual error be found in one of the tested lines, the principles in "Exceptional Cases," sections 29 to 34, must be considered. A permanent corner will then be erected at the corrected location on the township line, properly marked and witnessed, and recorded for future requirements.

65. Where triple corners were originally established on range lines, one or two of which have become obliterated, to reestablish either of them.—It will be borne in mind that only two corners were established as actual corners of sections, those established on the range line not corresponding with the subdivisional survey east or west of said range line. The surveyor will, therefore, first proceed to identify the existing corner or corners, as the case may be, and then

reestablish the missing corner or corners in line north or south, according to the distances stated in the original field notes of survey in the manner indicated for the reestablishment of double corners, testing the accuracy of the result obtained, as hereinbefore directed in other cases. If, however, the distances between the triple corners are not stated in the original field notes of survey, as is frequently the case in the returns of older surveys, the range line should be first carefully retraced, and marked in a manner sufficiently clear to admit of easy identification upon reaching same during the subsequent proceedings. The section lines closing upon the missing corners must then be retraced in accordance with the original field notes of survey, in the manner previously indicated and directed, and the corners reestablished in the manner directed in the case of double corners. The surveyor can not be too careful, in the matter of retracement, in following closely all the recorded indications of the original line, and nothing, however slight, should be neglected to insure the correctness of the retracement of the original line; since there is no other check upon the accuracy of the reestablishment of the missing corners, unless the entire corresponding section lines are remeasured by proportional measurement and the result checked by a recalculation of the areas as originally returned, which, at best, is but a very poor check, because the areas expressed upon the margin of many plats of the older surveys are erroneously stated on the face of the plats, or have been carelessly calculated.

66. Where triple corners were originally established on range lines, all of which are missing, to reestablish same.—These corners should be reestablished in accordance with the foregoing directions, commencing with the corner originally established when the range line was run, establishing the same in accordance with previously given directions for restoring section and quarter-section corners; that is to say, by remeasuring between the nearest known corners on said township line, and reestablishing the same by proportionate measurement. The two remaining will then be reestablished in conformity with the general rules for reestablishment of double corners.

67. Reestablishment of meander corners.—Before proceeding with the reestablishment of missing meander corners, the surveyor should have carefully rechaind at least three of the section lines between known corners of the township within which the lost corner is to be relocated, in order to establish the proportionate measurement to be used. It is also necessary, in retracing such original lines, to ascertain the real course used by the first surveyor. For instance, where he reported meridional lines as running due north, if they are found to have an average course of N. $1^{\circ} 20'$ E., the latter course should be considered in restoring an extinct north line to a meander corner.

68. These requirements of preliminary retracement of section lines must in no case be omitted; since it gives the only data upon which the fractional section line can be remeasured proportionately and probable course found, the corner marking the terminus, or the meander corner, being missing, which it is intended to reestablish. The missing meander corner will be reestablished on the section or township line retraced in its original location, by the proportionate measurement found by the preceding operations, from the nearest known corner on such township or section line, in accordance with the requirements of the original field notes of survey.

69. Meander corners hold the peculiar position of denoting a point on line between landowners, without usually being the legal terminus or corner of the lands owned. Leading judicial decisions have affirmed that meander lines are not strictly boundaries, and do not limit the ownership to the exact areas placed on the tracts, but that said title extends to the water which, by the plat, appears to bound the land.

As such water boundaries are, therefore, subject to change by the encroachment or recession of the stream or lake, the precise location of old meanders is seldom important, unless in States whose laws prescribe that dried lake beds are the property of the State.

70. Where the United States has disposed of the fractional lots adjacent to shores, it claims no marginal lands left by recession or found by reason of erroneous survey. The lines between landowners are therefore regarded as extended beyond the original meander line of the shore, but the preservation or relocation of the meander corner is important as evidence of the position of the section line. The different rules by which division lines should be run between private owners of riparian accretions are a matter of State legislation, and not subject to a general rule of this office.

71. Fractional section lines.—County and local surveyors being sometimes called upon to restore fractional section lines closing upon Indian, military, or other reservations, private grants, etc., such lines should be restored upon the same principles as directed in the foregoing pages, and checked whenever possible upon such corners or monuments as have been placed to mark such boundary lines.

In some instances corners have been moved from their original position, either by accident or design, and county surveyors are called upon to restore such corners to their original positions, but, owing to the absence of any and all means of identification of such location, are unable to make the result of their work acceptable to the owners of the lands affected by such corner. In such cases the advice of this office has invariably been to the effect that the relocation of such corner must be made in accordance with the orders of a court of com-

petent jurisdiction, the United States having no longer any authority to order any changes where the lands affected by such corner have been disposed of.

RECORDS.

72. The original evidences of the public-land surveys in the following States have been transferred, under the provisions of sections 2218, 2219, and 2220, United States Revised Statutes, to the state authorities, to whom application should be made for such copies of the original plats and field notes as may be desired, viz:

Alabama: Secretary of State, Montgomery.

Arkansas: Commissioner of State Lands, Little Rock.

Florida: Commissioner of Agriculture, Tallahassee.

Illinois: Auditor of State, Springfield.

Indiana: Auditor of State, Indianapolis.

Iowa: Secretary of State, Des Moines.

Kansas: Auditor of State and Register of State Lands, Topeka.

Louisiana: (after June 30, 1909) State officers.

Michigan: Commissioner of State Land Office, Lansing.

Minnesota: Secretary of State, St. Paul.

Mississippi: Commissioner of State Lands, Jackson.

Missouri: Secretary of State, Jefferson City.

Nebraska: Commissioner of Public Lands and Buildings, Lincoln.

North Dakota: State Engineer, Bismarck.

Ohio: Auditor of State, Columbus.

Wisconsin: Commissioners of Public Lands, Madison.

In other public-land States the original field notes and plats are retained in the offices of the United States surveyors-general.

SUBDIVISION OF SECTIONS.

73. This office being in receipt of many letters making inquiry in regard to the proper method of subdividing sections of the public lands, the following general rules have been prepared as a reply to such inquiries. The rules for subdivision are based upon the laws governing the survey of the public lands. When cases arise which are not covered by these rules, and the advice of this office in the matter is desired, the letter of inquiry should, in every instance, contain a description of the particular tract or corner, with reference to township, range, and section of the public surveys, to enable the office to consult the record; also a diagram showing conditions found, giving distances in chains and links and not in feet.

74. Preliminary to subdivision it is most essential to know the actual boundaries of the section, as it can not be legally subdivided until the section corners and quarter-section corners have either been

found, or restored by the preceding methods, and the resulting courses and distances determined by survey. The practice of entering a section to survey a tract from only one or two corners, and those perhaps unreliable, is unwarranted, and may result in litigation.

The order of procedure is: First reestablish the obliterated boundary corners; next, fix the lines of quarter sections; then form smaller tracts by equitable and proportionate division, according to the following rules:

75. Subdivision of sections into quarter sections.—Under the provisions of the act of Congress approved February 11, 1805, the course to be pursued in the subdivision of sections into quarter sections is to run straight lines from the established quarter-section corners, United States surveys, to the opposite corresponding corners. The point of intersection of the lines thus run will be the corner common to the several quarter sections, or, in other words, the legal center of the section.

76. Upon the lines closing on the north and west boundaries of a township, the quarter-section corners are established by the United States deputy surveyors at 40 chains to the north or west of the last interior section corners, and the excess or deficiency in the measurement is thrown into the half mile next to the township or range line, as the case may be.

77. Where there are double sets of section corners on township and range lines, the quarter corners for the sections south of the township lines and east of the range lines are not established in the field by the United States deputy surveyors, but in subdividing such sections said quarter corners should be so placed as to suit the calculations of the areas of the quarter sections adjoining the township boundaries as expressed upon the official plat, adopting proportionate measurements where the new measurements of the north or west boundaries of the section differ from the original measurements.

78. Subdivision of fractional sections.—Where opposite corresponding corners have not been or can not be fixed, the subdivision lines should be ascertained by running from the established corners due north, south, east, or west lines, as the case may be, to the water course, Indian boundary line, or other boundary of such fractional section.

79. The law presumes the section lines surveyed and marked in the field by the United States deputy surveyors to be due north and south or east and west lines, but in actual experience this is not always the case. Hence, in order to carry out the spirit of the law, it will be necessary in running the subdivisional lines through fractional sections to adopt mean courses, where the section lines are not due lines, or to run the subdivision line parallel to the east, south, west, or north

boundary of the section, as conditions may require, where there is no opposite section line.

80. Subdivision of quarter sections into quarter quarters.—Preliminary to the subdivision of quarter sections, the quarter-quarter corners will be established at points midway between the section and quarter-section corners, and between quarter corners and the center of the section, except on the last half mile of the lines closing on the north or west boundaries of a township, where they should be placed at 20 chains, proportionate measurement, to the north or west of the quarter-section corner.

81. The quarter-quarter section corners having been established as directed above, the subdivision lines of the quarter section will be run straight between opposite corresponding quarter-quarter section corners on the quarter-section boundaries. The intersection of the lines thus run will determine the place for the corner common to the four quarter-quarter sections.

82. Subdivision of fractional quarter sections.—The subdivision lines of fractional quarter sections will be run from properly established quarter-quarter section corners, with courses governed by the advice in sections 67 and 79, to the lake, water course, or reservation which renders such tracts fractional, or parallel to the east, south, west, or north boundary of the quarter section, as conditions may require.

83. By "proportionate measurement" of a part of a line is meant a measurement having the same ratio to that recorded in the original field notes for that portion as the length of the whole line by actual resurvey bears to its length as given in the record. Differences between former and new measurements may generally be expected. They may occur through using a chain of erroneous length, or by careless setting of pins, by neglect of leveling, or by error in transcribing notes, and these should be carefully avoided in retracement as in original surveys. Instead of the old practice of "adjusting the chain" to suit the former measure, the distance taken by a precise method is compared with that of the record, and the shortage or surplus is computed by proportion, producing the same result in a more reliable manner.

84. For example: The length of the line from the quarter-section corner on the west side of sec. 2, T. 24 N., R. 14 E., Wisconsin, to the north line of the township, by the United States deputy surveyor's chain; was reported as 45.40 chains, and by the county surveyor's measure is reported as 42.90 chains; then the distance which the quarter-quarter section corner should be located north of the quarter-section corner would be determined as follows:

85. As 45.40 chains, the government measure of the whole distance, is to 42.90 chains, the county surveyor's measure of the same distance,

so is 20.00 chains, original measurement, to 18.90 chains by the county surveyor's measure, showing that by proportionate measurement in this case the quarter-quarter section corner should be set at 18.90 chains north of the quarter-section corner, instead of 20.00 chains north of such corner, as represented on the official plat. In this manner the discrepancies between original and new measurements are equitably distributed.

86. A resurvey must be initiated at some well-defined, identified, and unquestioned starting point on the original surveys. It must terminate at some equally well-known and identified point; the intermediate corners being placed along that line in proportion as the whole redetermined distance is to the whole distance as originally reported. For example, should a line originally reported to be 160.00 chains be found by resurvey to be 164.00 chains, then the corners, originally reported as being placed 40.00 chains apart, will be placed 41.00 chains apart, and will be so reported by the later surveyor. This it will be seen requires that the whole distance between two well-defined corners (or points) be accurately known, in order to give the intermediate reestablished corners their proper relative positions, or distance apart.

FRED DENNETT,
Commissioner.

DEPARTMENT OF THE INTERIOR,
June 1, 1909.

Approved:
R. A. BALLINGER,
Secretary.

PREFERENCE RIGHT—RELINQUISHMENT PENDING CONTEST—
COLLUSIVE CONTEST.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 1, 1909.

REGISTERS AND RECEIVERS,
United States Land Offices.

GENTLEMEN: In accordance with departmental instructions contained in the decisions in the cases of *Crook v. Carroll* (37 L. D., 513) and *James v. Stanley* (37 L. D., 560), the following regulations are issued for your guidance:

1. In order to entitle a contestant to the preference right of entry conferred by section 2 of the act of May 14, 1880 (21 Stat., 140), it must appear not only that he has contested the entry and paid the

land office fees in that behalf, but that he has actually procured the cancellation of the entry.

2. Upon the filing of the relinquishment of an entry against which a good and sufficient affidavit of contest has been filed, you will, as heretofore, immediately note the cancellation of the entry and at once notify the contestant and advise him of his preference right. If the relinquishment is accompanied by an application to enter, presented on behalf of any one other than the contestant, or if at any time prior to the expiration of the period of preference right an application to enter is presented by any one other than the contestant, such application should be suspended to await the action of the contestant in asserting his preference right. This rule will be applied regardless of whether notice of the contest has been served or not.

3. Where, subsequent to the filing of a sufficient affidavit of contest, the entry is relinquished and a person other than the contestant is erroneously permitted to enter the land, you will, if it does not appear from the records of your office that notice of contest has been served upon the entryman who so relinquished, set a day for a hearing between the contestant and the intervening entryman, of which each shall have at least thirty days' notice, at which the former will be allowed to submit evidence that the relinquishment was the result of the contest and the intervening entryman such counter showing as he may deem proper; and it shall be competent for the contestant to show that the former entryman, or some one in privity with him in the sale or purchase of the relinquishment, had actual knowledge of the filing of the affidavit of contest. Where it appears of record that the defendant has been served with notice of contest, personally or by publication, it will be presumed, as a matter of law and fact, that the relinquishment was the result of the contest and the contestant awarded the preference right of entry without necessity for a hearing.

4. Where, prior to hearing in a contest, a junior contest is filed, alleging a valid ground for the cancellation of the entry and, in addition thereto, the collusive nature of the prior contest, the junior contestant may, if the entryman has been served with notice of the prior contest, intervene at the hearing and submit testimony in support of his charges. Should the junior contestant elect to offer testimony in support of his charge of collusion only, he will not gain a preference right of entry, if such charge be established. If at the time of the filing of the junior contest notice is not issued on the prior contest, you will issue such notice and at the same time notice on the junior contest; the latter notice must recite all the charges contained in the affidavit and state, in addition, that the junior contestant will be allowed to appear at the time set for taking testimony in the prior contest and offer evidence in support of his charges. The junior

contestant will be required to serve notice on both the prior contestant and the entryman.

5. If, before the case proceeds to a hearing, the entryman's relinquishment be filed, both contestants must be notified of the cancellation of the entry and of their right to apply to enter the land within thirty days after the receipt of such notice. Should both apply within such period, you will set a day for hearing, of which each shall have at least thirty days' notice, at which the junior contestant will be allowed to prove his charge of collusion and so defeat the claimed preference right of the prior contestant. An application to enter by a party other than either of the contestants, presented within the preference right period, must be suspended to await the action of the contestants in asserting their preference rights.

6. Where a junior contest charging collusion is not filed until after the prior contest has proceeded to a hearing, it will be suspended, pending the closing of the latter case, and must wholly fail if the entry be canceled as the result of the prior contest. This, however, will not prevent the junior contestant from attacking the application of the successful contestant to make entry, upon the ground of collusion or for any other valid cause, should the latter attempt to exercise the preferred right of entry, nor, should the prior contest result in favor of the entryman, will the junior contestant be precluded from prosecuting his case if his affidavit, in addition to the charge of collusion, states a sufficient ground for the cancellation of the entry other than the charge involved in the trial of the prior contest.

Respectfully,

FRED DENNETT, *Commissioner*.

Approved June 1, 1909:

R. A. BALLINGER, *Secretary*.

OPENING OF LANDS IN LEMHI INDIAN RESERVATION.

INSTRUCTIONS.^a

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 4, 1909.

REGISTER AND RECEIVER,
Hailey, Idaho.

SIR: The approved plats of survey of the Lemhi Indian reservation have been filed in your office and the lands, except as mentioned below, will in accordance with the provisions of the acts of February

^a See supplemental instructions, page 27.

23, 1889 (25 Stat., 687), and June 21, 1906 (34 Stat., 334), be subject to settlement under the general provisions of the homestead laws on July 15, 1909, but shall not be subject to entry, filing, selection, or other form of appropriation until August 16, 1909. No person will be permitted to gain or exercise any right whatever under any settlement or occupation begun prior to July 15, 1909, and all such settlement or occupation is hereby forbidden.

The lands on which there are Indian improvements will not be subject to settlement or entry by other than the preference-right purchasers, until the latter have had an opportunity, as provided by law, to enter the lands. A list of these purchasers, and the lands on which such improvements are located, was sent you with office letter of May 18, 1909, instructing you to give such purchasers notice that they are allowed 30 days from notice in which to purchase the lands. At the end of the period mentioned, all lands containing Indian improvements not entered by such preference-right purchasers will be subject to settlement and entry the same as the other lands in the reservation, but none of the lands will be subject to settlement before July 15th next. You will as soon as the preference-right period has expired, post in your office a list of the lands containing Indian improvements which were not purchased by such preference-right purchasers.

Furthermore, the lands comprising the agency and school plant and the school farm, together with the buildings thereon, viz: NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 28, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$, Sec. 29, T. 18 N., R. 24 E., 475 acres, will not be subject to settlement, but these lands and the buildings thereon, except the W. $\frac{1}{2}$ SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, the E. $\frac{1}{2}$ SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 29, T. 18 N., R. 24 E., 40 acres, and a tract of 5 acres occupied by the Foreign and Domestic Missionary Society of the Protestant Episcopal Church, will be sold at public auction at your office at not less than the appraised price under Secs. 2122 and 2123, U. S. R. S., on September 1, 1909. A list of these buildings and their appraised price will be furnished you as soon as possible. A copy of the notice opening these lands is herewith inclosed, and you will post the same in your office, and continue such posting until it is deemed no longer necessary. A copy of the notice has been sent the Lemhi Herald of Salmon, Idaho; Wood River Times, Hailey, Idaho; and the Star of Kansas City, Missouri, for publication.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

R. A. BALLINGER, *Secretary.*

OPENING OF LANDS IN LEMHI INDIAN RESERVATION—SUPPLEMENTAL INSTRUCTIONS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., June 11, 1909.

REGISTER AND RECEIVER,

Hailey, Idaho.

GENTLEMEN: The regulations of June 4, 1909 (38 L. D., 25), for the opening of lands in the former Lemhi reservation, are hereby so modified as to make the lands subject to entry only on July 15, 1909, and thereafter to both settlement and entry on August 16, 1909; but no rights can be acquired under any settlement made on any of these lands, under the homestead laws, prior to August 16, 1909, and no rights so claimed will be recognized by you.

You are directed to supervise the formation of applicants appearing at your office on July 15, 1909, into a line in the order in which they appear. The person first in the line will be accorded the first right to make entry, the person second in the line the second right, and so on. It will be well for you to assign to each person appearing in line a number corresponding with his position in the line and let the numbers thus given control the order in which applications to enter may be presented at your office. After the persons in line have been numbered, you will begin the allowance of entries by calling the names and numbers of the persons to whom numbers have been assigned, in the order in which they were assigned. This will obviate the necessity for applicants to remain in line until their applications can be presented. If any person fails to respond and present his application to enter when his number is called, he will lose his right to make entry under the number assigned to him and you will proceed to call the name and number of the person holding the next highest number and permit him to present his application to enter.

If, in the maintenance of order and the formation of the line it becomes necessary for you to do so, you will call on the local city and county authorities for assistance.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved, June 14, 1909:

R. A. BALLINGER, *Secretary.*

PLACER MINING CLAIM—LOCATION—IMPROVEMENTS—MINING
DREDGE.

GARDEN GULCH BAR PLACER.

A placer mining location made by several persons for the maximum quantity of land that may lawfully be embraced in a single location by that number of persons, can not be amended to include a larger area.

The owner of two or more contiguous placer mining locations can not, under the guise of amending one of them, substitute therefor a single location.

Where a placer claim or group of claims held in common contains deposits of such character and extent that they can be most economically worked by means of a mining dredge, and the owner of such claim or group has in good faith purchased and actually placed in good working order thereon a dredge, for the exclusive purpose of working such deposits, which dredge has not theretofore been used as the basis for patent for any other area, it is entitled to be regarded as a mining improvement, so far as that particular claim or group is concerned, and to have its cost accredited thereto.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, June 5, 1909.* (E. P.)

January 28, 1908, Joseph Wharton filed application for patent for the Garden Gulch Bar placer mining claim, survey No. 2,272, situate in the Centerville mining district, Boise land district, Idaho, upon which entry was allowed May 16, 1908.

The claim as applied for and entered embraces 129.665 acres. It lies longitudinally in a northeasterly and southwesterly direction, is 8,750 feet in length, and ranges in width from about 30 to 1,300 feet. Extending in a northwesterly direction from the westerly side line of the claim there is a projection, some 1,650 feet in length by from 208 to 360 feet in width.

The certificate of location upon which the survey and the application for patent were based recites that—

S. K. Goldtrap, the undersigned citizen of the United States, over the age of twenty one years, having complied with all the requirements of the laws of the United States and the State of Idaho, relating to the location of mining claims, and with the local laws, customs, rules and regulations of the mining district, in which this claim is located hereby make and file this my amended location of the "Garden Gulch Bar" Placer Claim, claiming by right of discovery, location, primal appropriation and possession, the ground hereinafter described, being about 8700 feet in length by about 600 feet in width, together with all the metals, minerals and mineral deposits within the lines of said claim.

This claim is situated in Centerville Mining District, County of Boise, State of Idaho, and is more particularly described as follows: (Here follows a description, by course and distance, of the exterior lines of the claim.)

This claim is bounded on the east by the Silver Key Placer, and on the South and southwest by the Junction Placer and contains 127 acres. The location work has been done near Corners No. 2, 5, 8, 9, 10, and half way between 9 and 10.

Consisting of Garden Gulch Bar Placer 80 acres, Eureka Placer of 40 acres and Reservoir Gulch of 20 acres.

This amended location is made in conformity with the original location made Sep. 28th, 1897, Dec. 14th, 1897, Oct. 28th, 1898, recorded Oct. 9th, 1897, Jan'y 6th, 1898, in Book 4 Page 148, 255 of Placer Locations in the office of the Recorder of said County, and it is made for the purpose of appropriating all ground within the boundaries hereinbefore described, and of more definitely describing the situation and boundaries of said claim, correcting any irregularities, informalities or errors, and supplying any defects which may exist in the original location or the record thereof; hereby waiving no rights acquired under and by virtue of said original location, and if the original location or the certificate thereof is void then this location shall be an original location and this certificate an original certificate.

Date of original Discovery Sep. 28, 1897, Dec. 14, 1897, October 28, A. D. 1898.

Date of Amended Location November 24, A. D. 1898.

S. K. GOLDTRAP.

The notice of location of the Garden Gulch Bar claim, as originally made, a copy of which notice constitutes a part of the abstract of title, reads as follows:

Notice, is hereby given that we the undersigned citizens of the United States, do this day claim under the Revised Statutes, of the U. S. and the laws of Idaho, 80. acres of Placer mining ground on this Bar, situated just below Garden Gulch Commencing at the notice at and joining the lower line of L. E. Anderson's claim on said Bar, thence running down the Bar, or creek 320 rods, in a southerly direction to a similar notice and being 40 rods wide, joining the west line of the silver Key creek claim on Grimes creek this claim shall be known as the "Garden Gulch Bar" placer claim situated about one mile below the town of Centerville, Boise County, Idaho, Centerville mining District.

Locators:

S. K. GOLDTRAP.

A. C. GOLDTRAP.

ART CUNNINGHAM.

SARAH C. CUNNINGHAM.

By deed dated October 4, 1898, Art Cunningham, Sarah C. Cunningham, and Anna C. Goldtrap conveyed to their colocator, S. K. Goldtrap, all their right, title, and interest in and to the said Garden Gulch Bar placer mining claim.

The Eureka claim appears, from an entry in the abstract of title, to have been located December 14, 1897, by Art Cunningham and F. M. Goldtrap, and according to a statement in the same entry "it joins 'Garden Gulch Bar' placer claim and is 160 rods long by 40 rods wide, containing 40 acres." The title to this claim, so far as anything to the contrary is sufficiently shown by the record, has never passed out of the locators thereof.

The certificate of location of the Reservoir Gulch claim reads as follows:

Notice is hereby given that I, the undersigned citizen of the U. S., do this day locate according to the laws of the U. S. and also the laws of Idaho twenty

(20) acres of placer mining ground in Reservoir Gulch, Centerville mining district, Boise County, Idaho, and more particularly described as follows: "Commencing at the west line of Garden Gulch Bar placer claim at the mouth of the gulch, thence running one hundred and sixty (160) rods westerly to stake and notice and twenty (20) rods wide, including all the gulch.

Known as Reservoir Gulch placer claim distant $\frac{1}{2}$ miles below town Centerville, Boise County, Idaho, October 28, 1898.

F. E. GOLDTRAP.

By deed dated November 9, 1898, the claim last referred to was conveyed by the locator to S. K. Goldtrap.

June 25, 1901, S. K. Goldtrap and Anna C. Goldtrap, his wife, conveyed to one Gratz "all their right, title, and interest to the Garden Gulch Bar placer mining claim, containing 127 acres," and this interest passed eventually by mesne conveyance to Joseph Wharton.

As near as can be determined from the present record, the so-called amended Garden Gulch Bar location embraces 59.725, of the 80, acres lying within the limits of the original claim of that name; 35.46, of the 40, acres embraced in the Eureka location; 8.16, of the 20, acres embraced in the Reservoir Gulch location; and 26.32 acres of, so far as appears, then vacant and unappropriated ground.

There are sought to be accredited to this claim, as attempted to be amended, the following improvements: An open cut 80 by 150 feet, valued at \$66.70, and a dredge 40 by 80 feet, valued at \$35,000, both situated within what would seem to be the limits of the original Garden Gulch Bar location; a storehouse, valued at \$200, and a building, denominated a "headquarters house," valued at \$1,500, situated within what would seem to be the limits of the Eureka claim; and four boarding houses, valued at \$200 each, situated on the new ground.

Upon considering the case, your office, by decision of December 18, 1908, held the entry for cancellation, on the grounds (1) that the applicant was not the owner of the Eureka claim at the time he attempted to include it in the amended Garden Gulch Bar location; (2) that there is no authority of law for consolidating by amendment two or more placer mining locations; (3) that the claim, as attempted to be amended, is not reasonably compact in form; and (4) that the available improvements are insufficient in value to satisfy the requirements of the law, it being held that the cost of neither the buildings nor the dredge can be properly accredited to the claim, for the reason that such buildings are not shown to be associated with actual mining operations, and that "in view of the size of the stream in which this dredge floats and the possibility of floating it off the claim, the dredge is not considered a permanent improvement."

From this decision the entryman appeals.

It appears from the foregoing that S. K. Goldtrap, being then the sole owner of the Garden Gulch Bar location, made by four persons for a certain 80-acre area, sought by way of amendment to so change the boundaries of said location as to exclude therefrom 20.275 acres, and include therein 69.94 acres of, so far as that claim was concerned, new ground (the latter consisting of 8.16 acres covered by the Reservoir Gulch claim, then owned by him; 35.46 acres covered by the Eureka location, then, and so far as the record shows, still owned by Art Cunningham and F. M. Goldtrap, the locators thereof; and 26.32 acres of then vacant and unappropriated land), and thus increase the area of the Garden Gulch Bar claim from 80 to 129.665 acres.

It is provided by section 2331, Revised Statutes, that no placer location shall include more than 20 acres for each individual claim, the word "claimant" as used in the section meaning *locator*.

In view of the provisions of said section it is clear that the Garden Gulch Bar location, having been made by four persons for the maximum quantity of ground that that number of persons could lawfully embrace in a single location, could not be amended by them so as to include a larger area. *A fortiori*, it could not be so amended by one person. Nor is there any authority for an owner of two or more contiguous placer mining locations to substitute therefor a single location, under the guise of amending one of them, as was attempted to be done with respect to a portion of the land involved in this case. Indeed, it would seem that such a substitution could lead to no result of any substantial benefit to an owner of several locations so attempted to be consolidated, other than to enable him to maintain a possessory right to, and obtain patent for, the area embraced therein, upon making annual and patent expenditures sufficient in value to satisfy legal requirements as to but one location, a result that would be in direct contravention of the plain terms of the placer mining laws, which require that expenditures of the amounts named therein shall be made upon or for the benefit of each separate location upon which, in possessory or patent proceedings, rights of claimants or applicants are sought to be predicated. For these reasons the so-called Garden Gulch Bar location must be held to be of no effect for any purpose whatsoever.

Referring to the separate locations upon which the so-called amended location was based, the Department finds that the record wholly fails to show that the claimant has, or ever had, title to the Eureka location, or any portion thereof. Therefore no further consideration will be given that location in connection with this case. It does appear, however, that at the time of submitting final proof on the application, the claimant owned the portions of the original

Garden Gulch Bar and Reservoir Gulch locations that are covered by the entry. Had he based his application for the latter area on these two locations, as a group, he undoubtedly would have been entitled, upon making a satisfactory showing as to improvements therefor, to a patent to that area. His application, therefore, was, as to that area, defective in form rather than in substance, and the Department sees no reason why the entry may not be permitted to remain intact as to the area common to that embraced in said two locations and the plat and advertised notice, provided the entryman, within a time to be fixed by your office, cause an amended survey to be made thereof, and file in your office a plat of such survey, together with a showing as to improvements sufficient to satisfy the requirements to be hereinafter named.

The Department concurs in the action of your office respecting the buildings, whose value is sought to be accredited to the claim. It is constrained, however, to express its dissent from the holding of your office to the effect that money expended in the purchase of a dredge placed upon a placer claim by the owner thereof can under no circumstances be accredited to that claim in satisfaction of the statutory requirements as to improvements therefor. On the contrary, it is of opinion that in cases where it has been, or shall be, satisfactorily shown that an area embraced in a placer location, or a group of locations held in common, contains deposits of such character and extent as to permit them to be more economically worked by means of a mining dredge than by any other means; that the owner of the claim or group has in good faith purchased, and actually placed in good working order thereon, a dredge, for the exclusive purpose of working such deposit, and that the dredge has not been used as the basis for patent for any other area, it is entitled to be regarded as a mining improvement so far as that particular claim or group is concerned, and to have its cost accredited thereto.

The showing as to the dredge, whose cost is sought to be accredited to the ground in question, does not meet these requirements, but if the deficiencies therein be supplied by a supplemental showing, the cost of that improvement will be, in the absence of other objections, accredited to the claim or claims for whose benefit it was made, if embraced in the amended survey and plat hereinabove required to be made and filed.

As thus amended the decision of your office is affirmed.

HOMESTEAD ENTRY—CULTIVATION—RAISING OF HOGS.

GEORGE HATHAWAY.

The use of land for the raising of hogs is an agricultural use, and where the land is better adapted to that use than tillage of the soil, meets the requirements of the homestead law with respect to cultivation.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, June 8, 1909.* (E. F. B.)

George Hathaway has appealed from the decision of your office of March 1, 1909, affirming the decision of the local officers, rejecting his commutation proof on his homestead entry, for the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 27, N. $\frac{1}{2}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 28, T. 2 S., R. 27 W., Camden, Arkansas, on the ground of insufficient cultivation.

Hathaway made entry November 15, 1906, and submitted commutation proof July 6, 1908. His proof shows that he began building his house October 12, 1906, and established actual residence therein November 20 following. His improvements consist of a one-room frame house with additional room used as a post-office; a blacksmith shop, stable, chicken house, 50 fruit trees, one small garden, one acre of land partly fenced, and two pens for fattening hogs, valued at \$250. It shows that claimant actually resided on the land continuously from November 20, 1907, up to submission of final proof, a period of about nineteen months and sixteen days, except from February 1, 1907, to May 1, a period of about three months, when he was away at work. He stated that at the time of his absence he was unmarried and had no family to leave on the place, but that he has since married. As to cultivation of the land he stated that he raised a small vegetable garden in 1907 and 1908, and was using the land for stock raising, mostly hogs; that he had one horse, 50 hogs, and about 50 rods of post and rail fence under construction; that the land is ordinary homestead land, mostly valuable for stock raising.

His proof was rejected by your office and by the local office, solely upon the ground of insufficient cultivation.

It does not appear to be questioned that claimant established and maintained a *bona fide* residence on the land for the period required under the commutation provisions of the homestead law. It is clearly shown by the proof that from the time he established residence on the claim up to the submission of final proof he maintained an actual residence upon the land for nearly twenty months, except for three months while absent at work, and there is nothing in the record to show that such actual residence has at any time since been abandoned.

In his appeal to your office claimant stated that he is the post-master in charge of the post-office at his house and that a great deal of his time is employed in carrying the mail. He gave that as a

reason why he had not made more actual cultivation of the land. Whether that was a sufficient excuse for his limited cultivation, it showed very conclusively that his actual home was upon the land. The only purpose that could be served by showing a larger area of cultivation would be to satisfy the Department that the land is being used for agricultural pursuits and to clearly establish the *bona fides* of his residence. But those facts are fully established by the proofs. The purpose of the homestead law is to secure the establishment of actual agricultural homes upon the public lands. The improvement and cultivation of the land are necessary acts to that end. But the use of the land for any agricultural purpose will answer the requirement of the law as to cultivation, whether it be in the planting and harvesting of crops, the use of it for hay, or for the raising of stock. Its office is to serve as proof of the establishment of an actual agricultural home.

If the land is better adapted to the raising of stock, whether it be cattle, horses, or hogs, and such occupation would be more profitable than the tillage of the soil, the entryman would be justified in making such use of it to the absolute exclusion of tillage and it would fully answer the requirements of the law as to cultivation.

Claimant made the entry with a view to the raising and selling of hogs, an occupation with which he was familiar. At the time of his appeal from your decision his stock had increased to 60. His improvements were ample for comfortable living. He had a horse, chickens, 50 fruit trees, and was annually reaping the profits from his agricultural pursuits. Can it be questioned that this is an actual agricultural home?

Your decision is reversed, and the entry will be approved for patent.

CONFIRMATION—PROCEEDINGS BY GOVERNMENT—AUTHORITY TO
REQUIRE ADDITIONAL EVIDENCE.

F. M. PLITER.

While the Government may prosecute investigations under proceedings begun against an entry within two years after final receipt at any time until the suspension on account thereof has been formally removed, it may not, after two years, require the entryman to furnish additional evidence of his compliance with law, unless such requirement be in furtherance of like action taken prior to the expiration of that period.

In the absence of a statute of specific limitation, the doctrine of laches does not apply as against the government.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, June 9, 1909.* (J. H. T.)

January 28, 1909, you transmitted motion for review upon behalf of F. M. Pliter, transferee, of departmental decision of January 2,

1909, in the matter of commuted homestead entry of Thomas N. Loudermilk for the N. $\frac{1}{2}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 7, T. 2 S., R. 20 W., The Dalles, Oregon, land district.

The said entry was made May 5, 1900, and commutation proof was submitted November 30, 1901, upon which final receipt issued December 5, 1901.

On November 14, 1901, a letter was written to your office by a resident of Oregon, attaching notices of publication of two entries, one of which was that of Loudermilk, and stated that both entries were fraudulent.

Your office, on December 7, 1901, directed Special Agent C. E. Loomis as follows:

You are directed to make a careful and thorough examination of these entries at the earliest date possible, together with the other entries in the vicinity complained of by . . . heretofore referred to.

Under date of April 7, 1903, Special Agent Dixon transmitted to your office a list of entries, among them that of Loudermilk, stating that the said entries would be duly investigated at as early a date as practicable.

October 31, 1903, you directed Special Agent Neuhausen to make investigation of a number of alleged fraudulent homestead entries, a list of which was to be turned over to him by Special Agent Dixon, the same being the list above referred to.

It does not appear that any report was received on the case under consideration until March 28, 1908, which was made by Special Agent Pollard. You state that said report shows that claimant had only a very small portion of the land plowed, that the land had been transferred to S. B. Barker and F. M. Pliter, of Condon, Oregon, and that the Special Agent also stated that he could not obtain definite evidence as to residence.

Instead of ordering a hearing upon said report, your office, by letter of August 18, 1908, called upon the entryman to submit a supplementary affidavit setting forth in detail the number of periods of absence from the date he established residence until the date he made proof, and the length of such periods, and also held that unless such affidavit be furnished, the entry would be canceled.

November 9, 1908, counsel for transferee filed in your office a motion to reconsider the case and for issuance of patent under the provision of section 7, act of March 3, 1891 (26 Stat., 1095). You denied said motion November 27, 1908, whereupon appeal was taken to the Department and your decision was affirmed January 2, 1909, of which latter decision this motion for review is filed.

There can be no doubt that the proceedings had in connection with the entry herein are sufficient to prevent the running of the statute.

(See cases of John S. Maginnis, 33 L. D., 306; John N. Dickerson, 33 L. D., 498; Cora M. Bassett *et al.*, 37 L. D., 167; and William Gribble, 37 L. D., 329.)

Counsel relies upon the decision in the case of Montana Implement Company (35 L. D., 576), in which case an investigation had been ordered by the Government within the two-year period, and a report favorable to the entry had been made, whereupon your office called upon claimant to furnish additional proof. The Department held that if the proceedings begun prior to the two-year period were abandoned, a new and different proceeding could not be thereafter commenced.

It is not necessary that the report upon which a hearing is ordered be made by the Special Agent originally directed to make the investigation. (Cora M. Bassett *et al.*, *supra*.) Neither is a proceeding necessarily abandoned by the Government upon receipt of a Special Agent's report which is insufficient upon which to order a hearing, or even a report favorable to the entry. Proceedings begun within proper time prevent the running of the statute until the suspension on account thereof is formally removed. It was not intended in the Montana Implement case, *supra*, to hold that further investigation might not have been had under the proceedings begun if the same had been advisable. And so in this case, still further investigation could be directed if it appeared advisable to do so. It does not seem, however, that further investigation would probably develop any new material facts, in view of the time that has elapsed and of the investigations already made.

In your said decision, November 27, 1908, explaining the action taken in your letter of August 18, 1908, you stated that the office preferred to act on the proof rather than proceed to a hearing and, therefore, required a supplemental showing of claimant; but "the question at issue, however, is the same as that incorporated in the protest, viz., whether or not the residence of claimant was sufficient."

The Department considers such action a new proceeding. If the proof upon its face was insufficient, no investigation was necessary to establish that fact. The investigation was ordered upon suspicion and charge of fraud, and unless the Government stands ready to prove the charge, the entry must be patented. It is not understood that you have abandoned the proceedings begun through the investigation originally ordered, but that you considered either of two courses open to you, and you preferred the one taken rather than put the Government to the trouble and expense of a hearing. The result, however, would be a different character of proceeding resulting in a shifting of the burden. After the lapse of two years from the issuance of final receipt, the entryman cannot properly be re-

quired to furnish additional evidence of his compliance with law, unless the present requirement be in furtherance of like action theretofore taken. After such period, when an entry is under attack, the burden is upon the Government or the individual who has prevented the running of the statute by proper proceedings begun prior to the two-year period. The party thus attacking an entry must furnish proof to sustain his charge if the entry is to be defeated. In this connection, see case of Montana Implement Company, *supra*. Therefore, your action requiring additional evidence as to residence was unauthorized.

Counsel representing the transferee contends that in view of the great length of time since making of proof, the land department should now be considered estopped from proceeding further against the entryman because of laches. This view cannot be accepted. Congress, by specific legislation in the said act of 1891, enumerated the conditions under which the Department is estopped from proceeding against entries of this class. As above stated, the conditions therein specified do not obtain in this case. In the absence of a statute of specific limitation, the doctrine of laches does not apply as against the Government. (See *United States v. Beebe*, 127 U. S., 338; and *United States v. Nashville, &c., Railway*, 118 U. S., 120.)

Furthermore, it cannot be assumed from the mere lapse of time that the land department has lacked diligence in pursuing its investigations. Expedition in such cases depends upon circumstances. The land department should, in justice to claimants, bend every effort to prevent undue delay and bring about as soon as possible a termination of the proceedings commenced against an entry. But it must be remembered that those persons who are guilty of violations of the law do nothing to assist the Government, but, on the contrary, usually make it as difficult as possible for the Government to procure proof of their wrong doing. The extensive and complex ramifications of frauds in connection with entries of public lands in certain sections have imposed an onerous burden upon the Department, and in some cases great delay has been the result. Under the circumstances, however, it should not be said that there has not been proper diligence.

There need be no further delay in this case, however. If you have sufficient information to warrant a hearing thereon, you will order same, and if not, you will pass the entry to patent.

In this connection it may be said that this is one of a number of entries made about the same time for land forming a contiguous body and said to have been made in the interest of the parties shown to be the same as the present transferees. Nine of these cases have been considered in connection with this motion, and, as your orders

for hearing in said cases have been upheld, it would seem that like action should be taken in this case.

Your said decisions of August 18, and November 27, 1908, and departmental decision of January 2, 1909, are modified accordingly.

UNTIMBERED UMATILLA INDIAN LANDS—GRAZING—ACT OF JUNE 29, 1906.

DANIEL C. BOWMAN.

To meet the requirements of the act of June 29, 1906, which provides that purchasers of untimbered Umatilla Indian lands who prior thereto had made full and final payments therefor should be entitled to patent upon submitting satisfactory proof that the lands are not susceptible of cultivation or residence but are exclusively grazing lands, a showing that the lands have actually been used for grazing purposes is not essential, where the fact that they are exclusively grazing in character is otherwise satisfactorily shown.

First Assistant Secretary, Pierce to the Commissioner of the General
(F. W. C.) *Land Office, June 11, 1909.* (J. H. T.)

Motion for review of departmental decision of January 19, 1909, has been filed by Daniel C. Bowman, who made application No. 735 May 8, 1903, to make Umatilla cash entry for the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 35, T. 1 S., R. 33 E., untimbered lands, and the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 30, T. 1 N., R. 30 E., timbered lands, La Grande, Oregon, land district, which was amended April 29, 1908, so as to embrace the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 35, T. 1 S., R. 33 E., and NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 30, T. 1 N., R. 35 E., W. M. Proof was made December 20, 1906, and certificate withheld to await the investigation of a special agent.

February 26, 1908, Special Agent Alexander submitted a report recommending that proof be considered under the act of June 29, 1906, and entry be passed to patent, and stating that there are no improvements of any kind; that there is no evidence that entryman made any use of the land; that the tract is a steep hillside, rough, stony and unfit for residence or cultivation, essentially grazing land; and that claimant made application for his own use and benefit.

In the proof offered by claimant it is shown that the land is grazing land, not suitable for residence or cultivation.

By your decision of June 3, 1908, you rejected the proof offered because it was not shown that the land had actually been used by claimant for grazing purposes. You cite the instructions under the act of June 29, 1906, and then state that—

under these instructions it is implied that if the lands are chiefly valuable for grazing and claimant takes them by reason of that purpose, showing no residence or cultivation, he must show that he has grazed same. The best evidence that lands are valuable for grazing purposes is proof that they have been used for that purpose.

Your said decision was affirmed by departmental decision of January 19, 1909, whereupon the motion for review was filed as stated.

The act of March 3, 1885 (23 Stat., 340), providing for the disposition of the Umatilla lands at public sale to the highest bidder at not less than the appraised value, provided:

And before a patent shall issue for the untimbered lands, the purchaser shall make satisfactory proof that he has resided upon the lands purchased at least one year and has reduced at least twenty-five acres to cultivation.

The act of July 1, 1902 (32 Stat., 730; 31 L. D., 392), provided for the disposition of the remaining lands at private sale under the conditions stated in the first act at the appraised price.

The act of March 3, 1905 (33 Stat., 1048, 1072-3; 33 L. D., 515), provided:

That all persons who have heretofore purchased any of the lands of the Umatilla Indian Reservation and have made full and final payment thereof in conformity with the acts of Congress of March 3, 1885, and July 1, 1902, respecting the sale of such lands, shall be entitled to receive patent therefor, upon submitting satisfactory proof to the Secretary of the Interior that the untimbered lands so purchased are not susceptible of cultivation or residence and are exclusively grazing lands incapable of any profitable use other than for grazing purposes.

The law last quoted was reenacted June 29, 1906 (34 Stat., 611).

The instructions issued under the act of March 3, 1905 (33 L. D., 515), stated that—

such purchasers will be required to show specifically in what respect the untimbered lands so purchased are not susceptible of cultivation, what efforts, if any, have been made to cultivate the same, and for what reasons residence could not be maintained thereon, and that the lands embraced in said entries are exclusively grazing lands incapable of any profitable use other than for grazing purposes, and to what extent they have been so used for grazing purposes since they were purchased.

The original act required residence and *cultivation*. It did not require *grazing*. The remedial act of 1906, made it unnecessary to show either residence or cultivation in perfecting entries where full payments had been made prior to said act, where it is satisfactorily shown that the lands are unfit for residence or cultivation. To require that the lands in such cases be grazed, would be to impose a condition not found in the law. The language of the act does not require it and such a requirement would be unreasonable and impracticable. The instructions merely indicated the line of proof in order to inform the Department and aid in an adjudication of the material question as to whether the lands purchased are incapable of any profitable use other than for grazing purposes.

Actual use for grazing would not prove this fact and other evidence might be more convincing than proof of such use.

This land is shown to be rough, steep and devoid of water, and while it may be grazed a portion of the year in common with the surrounding lands, it would not be practicable to fence same with a view to confining stock to this particular tract, on account of lack of water, and especially would such requirement be impracticable for one not living upon the land. The Government agent reporting on this entry supports the showing as to character, location and condition of the land.

These lands were first opened to entry through public sale, and by the act of 1902, they were made subject to entry at private sale with certain conditions imposed as stated above. The acts of 1905 and 1906 remove these conditions as to entries where full payments were made prior to said acts, respectively, upon the showing therein required to be made. Full payments had been made upon this purchase prior to the act of 1906, and being satisfied from the showing filed that the land cannot be profitably used for other than grazing purposes, I have to direct that in the absence of other objection final cash certificate be issued and the entry as thus completed passed to patent.

The previous departmental decision in this case is, upon the showing now made, recalled and vacated and your decision of June 3, 1908, is reversed. Former departmental decisions not in harmony herewith will no longer be followed.

PARAGRAPH 41 OF MINING REGULATIONS—EXTENT OF VEIN.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., June 11, 1909.

REGISTERS AND RECEIVERS,

United States Land Offices.

SIRS: The attention of the Department has been called to the last clause of paragraph 41 of the mining regulations, approved March 29, 1909 (37 L. D., 728, 766), which provides as follows:

The vein or lode must be fully described, the description to include a statement as to the kind and character of mineral, the extent thereof, whether ore has been extracted and of what amount and value and such other facts as will support the applicants' allegation that the claim contains a valuable mineral deposit.

It seems that the expression, "the extent thereof" is being construed as meaning that the applicant must affirmatively show by proof of exploration that the vein exists in fact throughout the whole length of the claim.

This construction of the paragraph is erroneous. By the words quoted it was intended to require the claimant to show the existence of a vein in such workings as he relied on to establish a discovery. By the extent of the vein was meant its size and quality as disclosed. That being done, the presumption exists that the vein extends on its strike throughout the whole length of the claim as located.

The sole purpose of that part of paragraph 41 quoted was to enable the land department to know, so far as applicant can reasonably show, the definite facts upon which the right to the patent is predicated so as to determine whether a valuable mineral deposit exists in the land claimed.

You will give this as wide publicity as possible, furnishing it to such newspapers in your district as may want to publish it or refer to it as a matter of news.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved June 11, 1909:

R. A. BALLINGER, *Secretary.*

EXCHANGE OF ALLOTMENTS—CEDED LANDS—ACT OF MARCH
3, 1909.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 14, 1909.

REGISTERS AND RECEIVERS,

United States Land Offices.

SIRS: It is provided by the act of March 3, 1909 (35 Stat., 781, 784), that:

If any Indian of a tribe whose surplus lands have been or shall be ceded or opened to disposal has received or shall receive an allotment embracing lands unsuitable for allotment purposes, such allotment may be cancelled and other unappropriated, unoccupied, and unreserved land of equal area, within the ceded portions of the reservation upon which such Indian belongs, allotted to him upon the same terms and with the same restrictions as the original allotment, and lands described in any such canceled allotment shall be disposed of as other ceded lands of such reservation. This provision shall not apply to the lands formerly comprising Indian Territory. The Secretary of the Interior is authorized to prescribe rules and regulations to carry this law into effect.

On May 28, 1909, the Secretary of the Interior approved instructions to agents, superintendents, and special allotting agents, prepared by the Commissioner of Indian Affairs, under this act. A copy of the same is enclosed. [See p. 44.]

Section four thereof provides that the officer of the Indian Service having charge of the proposed change in an allotment shall promptly advise the register of the appropriate land office of such proposed change.

You will accordingly, on receipt of such notice, *make proper notation* thereof on your *plats* and *tract books*, in the regular order of its receipt in your office, in relation to other applications for lands, noting the exact time of such filing on said notice, and keep the same and thereafter allow no appropriation of the lands affected, until advised of the final disposition of the application for change.

As this notice is intended merely to serve the purpose of caveat to prevent your subsequent disposition of the lieu land, you will give the same no serial number and make no report to this office thereof.

Very respectfully,

S. V. PROUDFIT,
Assistant Commissioner.

Approved, June 14, 1909:

R. A. BALLINGER, *Secretary.*

EXCHANGE OF ALLOTMENTS—CEDED LANDS—ACT OF MARCH 3, 1909.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 14, 1909.

REGISTERS AND RECEIVERS,

Cass Lake, Crookston, and Duluth, Minnesota.

SIRS: It is provided by the act of March 3, 1909 (35 Stat., 781, 784), that:

If any Indian of a tribe whose surplus lands have been or shall be ceded or opened to disposal has received or shall receive an allotment embracing lands unsuitable for allotment purposes, such allotment may be canceled and other unappropriated, unoccupied, and unreserved land of equal area, within the ceded portions of the reservation upon which such Indian belongs, allotted to him upon the same terms and with the same restrictions as the original allotment, and lands described in any such canceled allotment shall be disposed of as other ceded lands of such reservation. This provision shall not apply to the lands formerly comprising Indian Territory. The Secretary of the Interior is authorized to prescribe rules and regulations to carry this law into effect.

On May 28, 1909, the Secretary of the Interior approved instructions to agents, superintendents, and special allotting agents, prepared by the Commissioner of Indian Affairs, under this act. A copy of the same is enclosed. [See p. 44.]

Section 4 thereof provides that the officer of the Indian Service having charge of the proposed change in an allotment shall promptly advise the register of the appropriate land office of such proposed change.

You will accordingly, on receipt of such notice, *make proper notation* thereof on your *plats* and *tract books* in the regular order of its receipt in your office, in relation to other applications for lands, noting the exact time of such filing on said notice, and keep the same until advised of the final disposition of the application for change.

As this notice is intended merely to serve the purpose of a caveat to prevent your subsequent disposition of the lieu land, you will give the same no serial number and make no report to this office thereof.

Section 3 provides that the instructions of May 3, 1909, to the local officers at Cass Lake, governing the exchange of allotments within the Chippewa National Forest (act of May 23, 1908, 35 Stat., 268), shall apply, wherever practicable, to exchanges under the act of March 3, 1909, as to all Chippewa lands. A copy of said instructions is inclosed. (See 37 L. D., 665.)

As the act of May 23, 1908, was designed to encourage Indians having allotments in the National Forest to exchange the same for lands in the Chippewa reservation, outside of such forest, they were allowed to take allotments on the Chippewa reservation having pine thereon of equal value with that surrendered.

The act of March 3, 1909, provides for the taking of the lieu allotment on the unappropriated, unoccupied, and unreserved land within the ceded portions of the reservation upon which the Indian applying belongs. As this act is of a general nature, applying to all reservations, and as allotments have not been allowed of "pine lands" in the ceded portions of the Chippewa reservations, appraised for sale at a certain rate, for the benefit of the tribe, the privilege of taking pine lands of equal value with those surrendered is not granted by the act, and so the provisions of section one of the instructions of May 3, 1909, do not apply, except when the allotment desired to be changed is partly within the National Forest, in which case the provisions of section one will be extended to all the tracts in the surrendered allotment.

Sections two and three are applicable and will be followed.

It is intended that applications for changes under this act, with the evidence submitted in support of the same, should be filed with the proper officer of the Indian Service; consequently you will, where such applications are filed in your office, place the proper caveat on your records and forward the papers to such officer.

FRED DENNETT, *Commissioner*.

Approved June 14, 1909:

R. A. BALLINGER, *Secretary*.

EXCHANGE OF ALLOTMENTS—CEDED LANDS—ACT OF MARCH 3, 1909.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, D. C., May 28, 1909.

To AGENTS, SUPERINTENDENTS and SPECIAL ALLOTTING AGENT:

The act of March 3, 1909 (35 Stat., 781, 784), reads in part as follows:

That if any Indian of a tribe whose surplus lands have been or shall be ceded or opened to disposal has received or shall receive an allotment embracing lands unsuitable for allotment purposes, such allotment may be canceled and other unappropriated, unoccupied, and unreserved land of equal area, within the ceded portions of the reservation upon which such Indian belongs, allotted to him upon the same terms and with the same restrictions as the original allotment, and lands described in any such canceled allotment shall be disposed of as other ceded lands of such reservation. This provision shall not apply to the lands formerly comprising Indian Territory. The Secretary of the Interior is authorized to prescribe rules and regulations to carry this law into effect.

The following rules governing changes in allotments have been approved by the Department.

1. Under this law any Indian of a tribe whose surplus lands have been or shall be ceded or opened to disposal who has received or shall receive an allotment embracing lands unsuitable for allotment purposes, will be allowed to relinquish such allotment and select in lieu thereof unappropriated, unoccupied and unreserved land of equal area and like character, within the ceded part of the reservation on which such Indian belongs, on the same terms and with the same restrictions as the original allotment.

2. Each request for a change shall be made the subject of a separate report, in duplicate, accompanied by the papers and facts on which you base your recommendation for a change of allotment.

3. Departmental regulations of May 3, 1909 [37 L. D., 665], in the form of instructions to the register and receiver of the local land office at Cass Lake, Minnesota, governing the exchange of Indian allotments on Chippewa lands, under the act of May 23, 1908 (35 Stat., 268), shall apply, wherever practicable, to changes under the provision of the act of March 3, 1909, *supra*, as to all Chippewa lands.

4. In order that the lieu selections may be promptly noted in the tract books of the local land office, the register of the land office having jurisdiction over the lands selected for allotment must be notified of all selections of lieu allotments on the same day as submitted to the superintendent.

5. Endorse on the trust patent, where such has issued to the allottee, a relinquishment of all the right, title and interest in and to the allotment described therein, together with a description of the lieu lands wanted.

6. The relinquishment must be signed by the allottee, and acknowledged before you or some other officer authorized to take acknowledgments. All signatures by those who can not write should be by thumb print and witnessed.

7. Where the allottee has died, the relinquishment must be signed by the heirs of the decedent, and must be accompanied by an affidavit showing specifically that the persons who signed the relinquishment are the lawful heirs. The interests of living minors, whether in their own allotments or those inherited, must be relinquished by their natural guardians, as such.

8. Where the original trust patent has been lost or destroyed the relinquishment and application for reallocation may be submitted in the form of a letter, but the letter must be accompanied by an affidavit showing such loss or destruction of the original trust patent. If no patent has been issued that fact should be set out in the letter.

The following is the approved form of relinquishment, to be altered to suit the circumstances of each particular case:

State of _____ }
County of _____ } ss:

I hereby relinquish all my right, title and interest in and to the allotment described in the within trust patent, for and in consideration that I be allotted, in lieu thereof, the lands described as follows: _____.

Witness.
_____.

Subscribed and sworn to before me this _____ day of _____.

While the Indians are entitled to change their allotments under this act, where they have received worthless lands, it should be thoroughly understood that no application should be submitted to the office, which is based on other than the most substantial reasons.

Very respectfully,

R. G. VALENTINE,
Acting Commissioner.

Approved, May 28, 1909:

FRANK PIERCE,

First Assistant Secretary.

RAILROAD GRANT—ADJUSTMENT—SILETZ INDIAN LANDS—ACT OF
JULY 1, 1898.

NORTHERN PACIFIC RY. CO.

Lands within the former Siletz Indian reservation and opened to disposition by the act of August 15, 1894, are not subject to selection by the Northern Pacific Railway Company under the act of July 1, 1898.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, June 15, 1909.* (G. B. G.)

Under date of June 9, 1909, your office transmits for the consideration of this Department the application of the Northern Pacific Railway Company, filed February 24, 1909, to make selection per list No. 01602, under the act of July 1, 1898 (30 Stat., 597, 620), as extended by the act of May 17, 1906 (34 Stat., 197), of lot 4, Sec. 7, T. 8 S., R. 9 W., Portland, Oregon, in lieu of lot 4, Sec. 3, T. 1 S., R. 26 E., said State.

Your office reports that the tract applied for lies within the former Siletz Indian Reservation, and, referring to departmental decisions in *Cole et al. v. State of Washington* (37 L. D., 387), and *Northern Pacific Ry. Co.* (37 L. D., 408), requests that the Department consider the question of selection in the case presented and that your office be instructed as to whether or not said selection, among several others of like nature awaiting disposition, should be construed as being within the purview of the act of August 15, 1894 (28 Stat., 286, 326).

The act in question ratified and confirmed an agreement with the Alsea and other Indians, and opened to settlement certain lands in the Siletz Indian Reservation, providing for their disposition as follows:

The mineral lands shall be disposed of under the laws applicable thereto, and the balance of the land so ceded shall be disposed of until further provided by law under the townsit law and under the provisions of the homestead law: *Provided, however,* That each settler, under and in accordance with the provisions of said homestead laws, shall, at the time of making his original entry, pay the sum of fifty cents per acre in addition to the fees now required by law, and at the time of making final proof shall pay the further sum of one dollar per acre, final proof to be made within five years from the date of entry, and three years' actual residence on the land shall be established by such evidence as is now required in homestead proofs as a prerequisite to title or patent.

That all of the money so held by the United States to pay the delayed payments shall draw interest at the rate of five per centum per annum after the passage of this act.

In the case of Northern Pacific Railway Company (37 L. D., 667), the company had attempted to assert a right of selection under the act of July 1, 1898, *supra*, to certain lands in the former Fort Rice

Military Reservation, restored to the public domain under and in accordance with the act of July 5, 1884 (23 Stat., 103), as amended by the act of August 23, 1894 (28 Stat., 491), which provides, among other things, that the land should be appraised and disposed of to homesteaders, subject to such appraisement. After most careful consideration of said case it was held that such lands were not subject to the company's selection, mainly because the provision for appraisement amounts to an appropriation or dedication thereof to a particular use, and that they were therefore "reserved" from the company's selection within the meaning of the excepting clause in the act of July 1, 1898.

In view of this ruling, I have to advise you that that provision of the act of August 15, 1894, above quoted, which provides for the payment of \$1.50 per acre for lands restored to the public domain from the former Siletz Indian Reservation, amounts to a reservation and appropriation of said lands for a particular disposition, and that they are not therefore subject to selection under the acts of July 1, 1898, and May 17, 1906.

The cases of *Cole et al. v. State of Washington*, and *Northern Pacific Railway Company*, *supra*, cited by your office, are not controlling of the question presented. In those cases the lands involved were restored to the public domain under acts which did not require the payment of any money therefor.

THOMAS EMANUELSON.

Motion for review of departmental decision of May 13, 1909, 37 L. D., 687, denied by First Assistant Secretary Pierce June 18, 1909.

SOLDIERS ADDITIONAL—MILITARY SERVICE—SIXTH DELAWARE INFANTRY.

JURGEN KUHR.

Members of the Sixth Regiment Delaware Infantry Volunteers, organized and mustered in under special contract for duty in that State, are entitled to credit for military service, as a basis for soldiers' additional rights, only from the date or dates on which they were called upon to perform active military duty, and not from the date of muster-in.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, June 23, 1909.* (J. H. T.)

Jurgen Kuhr, assignee of Jonathan S. Green, has appealed from your office decision of April 26, 1909, rejecting his application to

enter, under Sec. 2306, R. S., lots 1 and 2, Sec. 2, T. 30 N., R. 20 E., M. M., Glasgow, Montana. The tract applied for contains 79.60 acres.

The application was based on homestead entry No. 1810, made by Jonathan S. Green at Nebraska City, Nebraska, April 13, 1868, for the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 10, T. 12 N., R. 10 E., containing 80 acres, and on military service alleged by Jonathan S. Green in the name of John S. Green, in Company G, 6th Regiment, Delaware Infantry Volunteers, claiming that he was mustered into said service November 22, 1862, and honorably discharged therefrom August 23, 1863.

It sufficiently appears from the affidavit of Jonathan S. Green, sworn to June 29, 1906, the affidavit of M. E. Balloo, dated August 16, 1906, and that of Phil Green, dated September 15, 1906, that the Jonathan S. Green who made said entry is identical with the John S. Green who performed military service in the said 6th Delaware.

The sole ground for rejecting the application is your holding that Green's military service was for less than ninety days, hence did not authorize favorable consideration, under the terms of the statute.

The appeal takes definite exception to that holding, and insists that the said Green served for more than ninety days in the Army of the United States during the War of the Rebellion.

Your office bases its holding on a supplemental report of the War Department, dated April 16, 1909. Said report reads as follows:

The 6th Delaware Infantry was organized in the months of October, November and December, 1862, and mustered into service for special duty in the State of Delaware with the condition that the officers and men were to receive pay only for the time they were actually on duty. After its muster into service the regiment was disbanded and the members thereof permitted to go to their homes to pursue their private vocations until the month of June, 1863, when they were called upon to perform military service.

The service of this regiment was therefore under a special contract which was in force for the period of nine months from the date of muster-in, the officers and men being bound for that period to perform service for the Government, provided that they were called upon to do so, but not until so called, and it has always been held by this Department that they were in the military service of the United States only from the date or dates on which they were called upon to perform active military duty.

Although the records show that John S. Green of Company G, of that regiment, was mustered into service November 22, 1862, it is also shown by the records that he was actually on duty in the military service of the United States from June 27, 1863, only to August 23, 1863, when mustered out.

In the case of Sarah A. Kersey, widow of William Kersey, late of Company G, 6th Delaware Volunteer Infantry, the Department (6 P. D., 1) affirmed the action of the Commissioner of Pensions rejecting the claim for pension under the act of June 27, 1890. Kersey, the deceased husband of the applicant, served in the same company and regiment with John S. Green, whose right to soldier's

additional entry is here in question, both having been mustered in on the same date, having been called into active service on the same date, and having been mustered out on the same date. The claim was rejected on the ground that service for at least ninety days is essential to pensionable status under the act of June 27, 1890, and that the soldier in question served less than the required period.

In said decision recital was made at length from the official orders of the War Department, and it was stated:

From the foregoing official papers, it is clear (1) that the actual service rendered by the 6th Regiment, to which the soldier (Kersey) belonged, extended from June 27, 1863, to August 22, 1863, a period of *less than sixty days*; and (2) that the members of said regiment were paid by the Government for only said period of actual service. These two facts of record can be neither ignored nor modified by this Department, and they furnish a conclusive index in determining the question whether or not the late soldier (Kersey) *served ninety days or more* in the Army or Navy of the United States during the late War of the Rebellion. . . . The fact appears that the 6th Regiment of Delaware Volunteers, to which the late soldier (Kersey) belonged, was simply a military regiment mustered into the service of the United States and then practically disbanded, but made subject to a *call into the service* as occasion or emergency might require. They were not enlisted in the Army for regular service but for *special service*.

Secs. 2304 and 2306, R. S., upon which the alleged claim herein is based, reads substantially, so far as here material, as the act of June 27, 1890, upon which the decision above quoted was rendered, except that the act of 1890 requires ninety days service in the *military or naval service* of the United States, while Sec. 2304 requires service for said period in the *Army, Navy, or Marine Corps* of the United States.

The cases of Edgar A. Coffin (32 L. D., 44), Julian D. Whitehurst (32 L. D., 356), George C. Hazelet (32 L. D., 500), and like cases, wherein it is stated that the date of the muster-in determines the beginning of the service of a soldier, were intended only to apply to the ordinary and usual muster-in and not to a special muster-in or contract as shown in the case here under consideration. In said decisions it was intended to establish the rule that the service, required as a basis for a soldiers' additional right, must have been in the Army, Navy, or Marine Corps of the United States, and that service rendered before actual muster-in to such organization was not service defined by the law, and therefore the period between the date of the enlistment and the date of the actual muster-in could not be credited. Said decisions are not considered in conflict with the holding now made that the soldier herein did not serve the required ninety days as required by Sec. 2304, R. S.

In the case of George W. Hill (7 P. D., 235), it was stated:

The question as to commencement of service is peculiarly within the province of the War Department to determine from its records, and when determined, after full consideration of the law and the facts in any claim based upon service during or since the War of the Rebellion, this Department will accept such determination as final.

It is, therefore, held that Green did not perform military service for the required ninety days, and, therefore, your action rejecting the application is affirmed.

OKLAHOMA PASTURE LANDS—PAYMENTS—EXTENSION OF TIME.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 24, 1909.

REGISTER AND RECEIVER,
Lawton, Oklahoma.

GENTLEMEN: I am in receipt of your letter of May 20, 1909, requesting instructions in the matter of collections on deferred payments on pasture lands sold under the acts of June 5, 1906 (34 Stat., 213), and June 28, 1906 (34 Stat., 550).

The acts under which these lands were sold, referred to above, contained substantially the same proviso, to wit:

In case any purchaser fails to make such annual payments when due, all rights in and to the land covered by his or her purchase shall at once cease, and any payments theretofore made shall be forfeited and his or her entry shall be canceled.

Thus an absolute forfeiture was provided as penalty for failure to pay any annual payment when due.

By the acts of March 11, 1908 (35 Stat., 41), and February 18, 1909 (35 Stat., 636), extensions of time for one year from the date the annual payments affected thereby became due were provided for. As a *condition precedent* to obtaining the benefits of such extensions, a payment of four per centum, under the act of June 5, 1906, and five per centum, under the act of June 28, 1906, upon the amount of the deferred instalment, was required.

In a large number of cases, entrymen, with the intention of submitting commutation proof, have failed to make the payment due at the end of the first year, or to pay the per centum which would entitle them to the benefits of the relief acts of March 11, 1908, and February 18, 1909.

Under the terms of the original act, June 5, 1906, these entries were subject to forfeiture, but in view of the statutory extensions of time,

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such persons will be deemed to have intended to avail themselves of the relief afforded, and will be required to pay the per centum fixed by law.

You will observe that this payment is not *interest*, but is in the nature of a premium for the additional privilege; and being, as before stated, a condition precedent, upon payment thereof the entryman may avail himself of the year's time granted by the law. Whether he takes advantage of the entire year, or makes proof in a less time, is optional with the entryman, but the payment for such privilege is the same in any event.

Where the lands were sold under the act of June 5, 1906, in all cases in which a payment is deferred, and regardless of the time such payment is deferred under one year, you will collect four per centum of the amount of such delayed instalments.

Where the lands were sold under the act of June 28, 1906, you will collect five per centum of the amount of the deferred instalment, as above, and this payment will be in lieu of interest for the year for which the payment is extended.

In all such cases wherein you have been directed to require *interest* payment for a given time, you will instead collect four per centum of the amount of the instalment not paid when due.

These instructions will supersede any former instructions which may be in conflict herewith.

Very respectfully,

S. V. PROUDFIT,
Assistant Commissioner.

Approved June 24, 1909:

FRANK PIERCE, *Acting Secretary.*

PRACTICE—WITHDRAWAL OF CONTEST PENDING APPEAL—DISMISSAL
OF APPEAL—READJUDICATION.

OWNBEY v. CULVER.

Where a contest is withdrawn while an appeal to the Department by the entryman is pending, and the entryman thereupon and for that reason withdraws his appeal, the matter should thereupon be reconsidered as between the entryman and the government in the light of conditions then existing.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, June 26, 1909.* (J. F. T.)

May 13, 1902, Frederick W. Culver made homestead entry number 20878 for the S. $\frac{1}{2}$ NW. $\frac{1}{4}$ and N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 14, T. 4 N., R. 70 W., 6th P. M., Denver, Colorado, land district.

September 25, 1906, Jephtha Y. Ownbey filed contest affidavit against said entry, alleging that:

Culver has not established and maintained his residence upon said land for any period of time, or at all, since date of the entry thereof and application therefor aforesaid, and has not improved and cultivated said land as required by law.

The hearing was before the local officers in January, 1907, all parties appearing in person with counsel and witnesses, and by joint decision of August 12, 1907, cancellation of the entry was recommended.

Upon appeal to your office, by your decision of January 20, 1908, the action of the local officers was affirmed upon the ground that the entryman had not maintained "a *bona fide* residence upon the land entered for a home to the exclusion of one elsewhere."

From your decision claimant appealed to the Department and on May 27, 1908, said appeal was disposed of as follows:

May 13, 1908, you transmitted to the Department the record in the above entitled case, with the appeal of Frederick W. Culver from your decision of January 20, 1908, and on the same date, May 13, 1908, you referred to the Department a dismissal of said appeal by Chas. M. Kreuger, attorney of record for said Frederick W. Culver.

There is also found among the files in said case a dismissal of said contest by Jephtha Y. Ownbey.

The appeal is accordingly dismissed, and the case is returned to your office for appropriate action.

Said letter of the Department was promulgated by your office letter "H" of June 8, 1908, and the local officers having reported no action taken by the entryman, by your office letter "H" of December 9, 1908, said entry was canceled and the case closed.

December 17, 1908, the local officers transmitted to your office final certificate number 0980 for the land in question, issued to Culver August 24, 1908, upon his final proof that day duly submitted, with his motion for review of the action of your office cancelling his entry. The motion is as follows:

When Ownbey dismissed his contest against this entry, there was no occasion for the Secretary passing upon the matter, and therefore the contestee, through his attorney, filed a dismissal of his said appeal.

This procedure naturally should have left the entry intact upon the records of the General Land Office and the Denver Land Office, and we are at a loss to understand why the Honorable Commissioner, upon December 9, 1908, canceled the entry of Culver upon the records of the General Land Office, and directed the Denver Land Office to note said cancellation upon their records, which they did.

The contest against the entry of F. W. Culver having long since been dismissed, it was error upon the part of the Commissioner to cancel said entry upon a dismissed contest.

It is therefore prayed that the said entry No. 20878 be reinstated upon the records of the General Land Office; and that the Denver, Colorado, land office be instructed to reinstate the said entry upon their records.

It is further prayed that, pending your determination of this matter, the Denver, Colorado, land office, be instructed to allow no other entry or application for the land embraced in the canceled homestead entry No. 20878 of Frederick W. Culver.

By your decision of March 10, 1909, you denied this motion, holding as follows:

Culver's dismissal of his appeal left the decision of this office, holding his entry for cancellation, final. His dismissal was unaccompanied by any motion for reconsideration or review of the said decision, or a petition that his entry be allowed to remain intact. From his motion now filed, he seems to have concluded that the withdrawal or dismissal by Ownbey of his contest, had the effect of leaving the entry in the same condition it occupied before being contested. Such conclusion cannot be sustained. This office having once held an entry for cancellation on evidence submitted at a hearing duly had, will not, of its own motion, allow such entry to remain intact, simply because the plaintiff has seen fit to dismiss his contest. The Government is always a party in interest in disposing of the public domain and will see to it that entries will not be passed to patent with evidence pending in the land department showing noncompliance with the law.

The motion to reinstate the entry upon the showing made is denied and the final certificate will be noted canceled as of date of cancellation of the original entry, unless appeal is filed within sixty days from receipt of notice.

It was error to issue final certificate until the contest had been finally acted upon by this office and in the future, in similar cases, you will allow the proof but suspend the issue of final certificate until the case is closed.

In due time report action taken by Culver, transmitting therewith evidence of service of notice hereof upon him.

Culver has appealed to the Department.

The question involved is one of procedure, but the substantial rights of entryman are involved. Upon examination of the record it appears that the dismissal of the contest by Ownbey was transmitted to your office by the local officers on the date of its execution, April 21, 1908, and received April 24, 1908. After title of case and description of entry, it reads as follows:

In the matter of the above-entitled case:

Comes now Jephtha Y. Ownbey, contestant, and hereby dismisses his contest against said described entry for the reason that he does not desire to further prosecute the same. Further, that he does not desire further to be a party to depriving entryman of his right to the land embraced in his said entry and the improvements placed thereon by him. (Signed) JEPHTHA Y. OWNBEY.

Witness to signature: EMMA T. KRUEGER.

It further appears that the dismissal of the appeal by Culver was executed at Denver, Colorado, April 24, 1908, transmitted to your office by the local officers on May 7, 1908, and received in your office

May 11, 1908. After title of case and description of entry, it reads as follows:

In the above-entitled case:

Comes now, Frederick W. Culver, by his duly authorized attorney-in-fact, Charles M. Krueger, and dismisses his appeal from the decision of the Commissioner of the General Land Office, filed March 25, 1908, for the reason that the contestant, on April 21, 1908, filed a dismissal of the contest. (Signed) CHAS. M. KRUEGER, attorney for FREDERICK W. CULVER.

It thus appears that his appeal was dismissed by Culver because of the dismissal of the contest by Ownbey, no doubt with the understanding and belief that the case, being thus left between Culver and the Government, would be adjudicated upon different principles and under different rules than those applicable in a personal contest proceeding. It is clear that contestant was eliminated from further consideration in the case. The local officers evidently knew of the withdrawal of this contest, and it is probably for that reason that they supposed themselves justified in issuing final certificate upon the proof afterward submitted by Culver, as said officers were familiar with every step taken in connection with this entry.

By your action in holding your decision of January 20, 1908, in the contest case, final, Culver was denied any possible benefit of his appeal to the Department, and also denied an adjudication of his case under the rules applicable to a proceeding between the Government and an uncontested entryman. Almost two years elapsed between the date of the filing of this contest, September 25, 1906, and the submission of Culver's final proof, August 24, 1908, and there is nothing to show that he did not reside continuously upon and cultivate this land for the entire period between said dates.

In view of the facts herein stated and in consideration of the entire premises, no other rights having intervened because of the subsisting uncanceled final certificate of record in the local office, it is thought that the entryman is entitled to a readjudication of his case upon the entire record as between himself and the Government, with the right of appeal to the Department after notice of your action. Nothing herein will be considered as interfering with your judgment as to what, if any, portion of the testimony in the contest hearing shall be considered by you in this new adjudication, nor with any action you may deem proper as to further investigation in connection with said entry, and your previous decisions in connection therewith are hereby vacated and the case remanded to your office for further proceedings in accordance with the views herein expressed.

CONSTRUCTIVE RESIDENCE—OFFICIAL EMPLOYMENT—ASSISTANT
POSTMASTER.

EUGENE E. HOLBROOK.

After residence has in good faith been established upon a homestead claim, absence due to employment as assistant postmaster in a fourth-class post office, under an appointment made prior to April 1, 1909, will be regarded as constructive residence, where it is shown that the business of the office required the services of an assistant and the duties incident to such employment were actually and continuously performed by the entryman and that his absence from the claim was due to such employment.

First Assistant Secretary Pierce to the Commissioner of the General Land Office, June 26, 1909. (C. J. G.—J. F. T.)

An appeal has been filed by Eugene E. Holbrook from the decision of your office of February 10, 1909, sustaining the action of the local officers in rejecting the final proof submitted on his homestead entry for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 28, and SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 27, T. 18 N., R. 12 W., Oakland, California.

The entry was made May 16, 1901, and final proof submitted May 18, 1908, which was rejected by the local officers because of insufficient showing as to residence.

The proof shows that Holbrook's (first) house was built in August, 1901. He states that he established residence "in the summer of 1901," and his witnesses say that "his settlement and residence began over five years ago." His improvements consist of a frame house 12 by 16 feet, clearing, road, and material for fence, all valued at \$200 or \$300. The members of his family were himself, wife and three children. He states that their residence on the land was not continuous as his duties would not permit of continuous residence.

We were there part of each season and during vacations in school. For five years after taking this claim I was Dep. Postmaster at Potter Valley, and since Jan., 1907, I have been County Recorder, so could not reside continuously on my homestead, and my children were too small for my family to stay there without me. No school near the land and I had to be absent for this reason also. I established residence in summer of 1901, and was appointed Dep. Postmaster in January, 1902. Have taken in stock on pasture, quite a number of cattle and hogs. Have not used it for cultivation but have grazed stock there each season since settlement. Had 2 or 3 head of my own horses there.

With the final proof was submitted the following affidavit:

John M. Roberts, being duly sworn, deposes and says: That at all times from January 1st, 1902, to the present time he was the Postmaster at Potter Valley, Mendocino County, California.

That Eugene E. Holbrook was the Assistant Postmaster at that office from January 1st, 1902, to August 1st, 1906, but was absent from the office from October 10, 1902, to May 10, 1903.

Your office, in affirming the decision of the local officers, who made no reference to official employment, found:

It appears that the Postoffice at Potter Valley, California, is a fourth-class postoffice, and it has been held by the Department that employment as deputy or assistant in fourth-class postoffices can not be held as official duty, excusing the presence of the homestead entryman on the lands.

In instructions of February 16, 1909 (37 L. D., 449), it is stated:

For many years it has been the practice of the Department to permit a homestead entryman who had established residence upon his claim, and afterwards had been elected or appointed to a Federal, State, or County office, to be absent from his entry if required by his official duty, and to consider such absence constructive residence upon his claim. This ruling includes deputies and assistants in such offices.

As the privilege above referred to was found to result in grave abuse, it was decided in said instructions to limit the practice of allowing credit for constructive residence on account of official duty to those persons who have been elected to office. But the change of practice was not intended to operate upon persons who have acted under the old rule, or to deny the benefit of such rule to persons occupying appointive offices prior to April 1, 1909.

The general knowledge, of which notice can be taken, that the duties of a postoffice of the fourth-class do not usually require the services of as many as two people, was the probable basis for the practice referred to by your office, namely, that employment as assistant in such an office can not be accepted as official duty excusing residence on a homestead claim.

In the unpublished case of Neta Galloway, April 26, 1909, the facts were that entry was made August 26, 1902, upon which final proof was submitted March 18, 1908, and final certificate issued the same day. The proof shows that claimant was appointed assistant postmaster in a fourth-class postoffice in December, 1906. No question was raised as to her compliance with law in the matter of actual residence up to the time of such appointment. Numerous affidavits were filed showing that the business transacted in said postoffice was such as require the services of two people and that claimant was actually and continuously employed for the time stated in her final proof. Upon the showing made it was determined that the claimant in that case was entitled to credit in her homestead proof for constructive residence during the period of her employment in the postoffice.

The principle in the Galloway case was likewise involved in the case of Ray v. Shirley (34 L. D., 30), wherein it was said:

The Department has held that absences made necessary by official duties may be excused, provided such duties devolved upon the entryman subsequently to the making of the entry and the establishment of residence upon the land,

but it is not sufficient to show that the entryman held an office the duties of which had to be performed at some place other than the land embraced in his entry. It must appear that his absence was due to his official position or employment, and if this is not shown, the fact that he held such official position constitutes no sufficient excuse for his absence from his claim. It is material, therefore, to a proper disposition of this case to determine whether the defendant's absence from the land has been shown to have been due to his official position.

It is observed that the final proof of Holbrook is very indefinite as to when he established residence, or what acts were performed by him at the time. His appointment as Assistant Postmaster followed soon after the alleged establishment of residence, and beyond the mere statement of such appointment does not show that the duties of such office required an assistant or that he actually and continuously performed such duties. In fact there was a period of eight months when he was not employed in the office, but it is neither alleged nor shown that the time during the absence was spent on the land.

The practice of accepting a showing of official employment as an excuse for absences from the homestead rests on no express statutory enactment, and while recognizing the practice, the Department has never accepted such employment as a showing in homestead proof upon the mere assertion of appointment. While absences after *bona fide* establishment of residence, rendered necessary by the duties incident to appointment as assistant postmaster in a fourth-class post-office, may be excused, that is, in cases of appointment prior to April 1, 1909, yet under the decisions of the Department it is not sufficient to merely allege the fact of appointment—it must also be shown that the absences were in fact due to such appointment, that the services of the appointee are justified and required by the business of the office, and that the duties incident to the employment were actually and continuously performed.

In the foregoing view the action of your office in rejecting Holbrook's final proof upon the showing therein made was warranted, although such rejection was for a different reason. But before finally rejecting the final proof or canceling the entry, he should be given a reasonable time, to be fixed by your office, in which to submit evidence supplemental to such proof along the lines above indicated. In the event of failure to furnish such supplemental evidence satisfactory in all respects, the action of your office rejecting Holbrook's proof will stand approved and his entry will be canceled.

The decision of your office is modified accordingly.

RECLAMATION-IMPROVEMENTS-CONDEMNATION-SEC. 7, ACT OF
JUNE 17, 1902.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 30, 1909.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: Paragraph 9 of regulations approved June 6, 1905 (33 L. D., 607), concerning the procedure on failure to agree on the amount to be paid the owners of improvements on lands needed in the construction and maintenance of irrigation works in pursuance of the act of June 17, 1902, is hereby amended to read as follows:

9th. Where the owners of the improvements mentioned in the preceding section shall fail to agree with the representative of the Government as to the amount to be paid therefor, the same shall be acquired by condemnation proceedings under judicial process as provided by section 7 of the Reclamation Act.

Very respectfully,

FRED DENNETT, *Commissioner.*

Approved June 30, 1909:

FRANK PIERCE, *Acting Secretary.*

ADDITIONAL HOMESTEAD ENTRIES WITHIN RECLAMATION PROJECTS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., June 16, 1909.

THE DIRECTOR OF THE
RECLAMATION SERVICE.

SIR: With your letter of May 3, 1909, you submitted four questions, as follows:

1. Whether a person who has made entry upon the public domain for less than 160 acres may make an additional homestead entry within a reclamation project.

2. Whether a person who has entered and proved up on a farm unit within a project may make an additional entry of public lands outside of the project, and

3. Whether a person who makes entry for a unit of less than 160 acres within a project may, after proving up upon same, make an additional entry within the same project.

4. Whether under the conditions of proposition 3 the entryman could make an additional entry on another project.

You state that these questions had been taken up informally with the General Land Office and that "concurrence of view has been obtained to the effect that the first question must be answered in the affirmative, and the second, third, and fourth questions in the negative."

The Commissioner of the General Land Office, in his letter of May —, 1909, concurs in the conclusion stated by you as to the second, third, and fourth propositions, but is inclined to the opinion that the first must also be answered in the negative, although a different rule might have been recognized by his office.

Upon consideration of the matter the Department is clearly of opinion that one who has made entry upon the public domain for less than 160 acres is disqualified from making an additional entry of a farm unit within a reclamation project, which farm unit is the equivalent of a homestead entry of 160 acres of land outside of the reclamation project. The same reasoning which leads to a negative answer to the second proposition inevitably leads to a like answer to the first proposition. You are advised that each of the four propositions submitted must be answered in the negative.

Very respectfully,

R. A. BALLINGER, *Secretary.*

MINING LOCATIONS IN NATIONAL FORESTS—JURISDICTION OF LAND DEPARTMENT.

H. H. YARD ET AL.

The land department has full authority, of its own motion or at the instance of others, to inquire into and determine whether mining locations within National Forests were preceded by the requisite discovery of mineral and whether the lands are of the character subject to occupation and purchase under the mining laws, notwithstanding the locator has not applied for patent; and if the locations be found to be invalid, the lands covered thereby will be administered as part of the public domain, subject to the reservation for forest purposes, without regard to the locations.

A placer location for 160 acres, made by eight persons and subsequently transferred to a single individual, invalid because not preceded by discovery, can not be perfected by the transferee upon a subsequent discovery.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, July 3, 1909.* (E. B. C.)

H. H. Yard, the North California Mining Company, and certain other parties have appealed from your office decision of February 27, 1908, wherein, concerning 85 placer mining locations situated in T. 25 N., R. 9 E., M. D. M., and the immediate vicinity and now

embraced within the Plumas National Forest, Susanville, California, land district, it was held:

that said locations were invalid when made, because of insufficiency of discovery, and that prospecting thereon since dates of location has failed to show the lands to be valuable for their mineral deposits, and is insufficient to warrant locators in continuing in possession thereof.

This decision was an affirmance of the findings and conclusions theretofore reached by the local officers from the evidence adduced at the hearing.

All of the claims are particularly named and described by legal subdivisions in your office decision, which details need not be restated here. The claims in most instances embrace 160 acres and purport to have been located during October and November, 1902, January, 1904, January, 1905, and a few later; the last four, May 12, 1906.

Under date of March 13, 1907, the Acting Forester filed in your office a protest against these claims and others. April 16, 1907, your office directed the local officers to order a hearing and issue proper notice thereof, and therein set forth the charges as follows:

That the lands embraced by the hereinafter described placer mineral locations and situated within the present limits of the Plumas National Forest, California, "are nonmineral in character; that no discovery of mineral has been made upon them by the locators or claimants, and that the proper development work has not been performed by the claimants."

It has been further charged that some of the locators of these claims joined in the locations, not in good faith for their own benefit, but in the interests of H. H. Yard, or other parties.

Notices were issued, to which were attached copies of your office letter, and service was duly made upon the various claimants. In July, 1907, certain depositions were taken, and in August and September following, the hearing proceeded before the local officers. Evidence was submitted on behalf both of the Government and certain of the claimants, who were represented by counsel, but a number of the record claimants made default. The record, as finally made up, comprises some 1,500 pages of testimony, together with numerous papers, plats, abstracts, and samples presented as exhibits and introduced in evidence.

The claims here involved are but a small portion of a large number, several hundred, of asserted placer mining locations that over-spread the public domain of that region, both within and without the national forests. It is well remarked by counsel in the opening portion of their brief that "the questions involved in these hearings are both important and interesting."

Counsel for claimants in their appeal have set forth twelve grounds therefor, covering questions both of law and fact. In oral argument and in their printed brief counsel confine themselves principally to a

discussion of the various legal questions arising upon the record. The important and basic contentions urged are that this proceeding is not authorized by and is without authority of law; that the land department has no jurisdiction to determine the questions involved; that the proceeding has no proper basis, not having been initiated by or on behalf of any person having a right to complain, or founded upon a duly verified protest or contest; and that, even conceding the action warranted and proper, the inquiry can result in no possible good and is entirely ineffectual for the reason that the land department can not enter up a judgment of ejectment against the claimants, and, if it did, is entirely without authority to enforce any such adjudication. They, further, urge broadly that the decision complained of is not sustained by, and is contrary to, both the law and the evidence.

The objections to the jurisdiction of the land department, if well founded, are determinative of the controversy and will, therefore, be first examined and discussed.

The following provisions of law outline the general scope of the power and authority vested in the Interior Department pertaining to the public domain and specifically to the mineral lands thereof:

The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

Second. The public lands, including mines. [Sec. 441, R. S.]

The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government. [Sec. 453 *Id.*]

The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution by appropriate regulations, every part of the provisions of this Title not otherwise specially provided for. [Sec. 2478 *Id.*]

The title specified is "Title XXXII, The Public Lands," of which "Chapter Six, Mineral Lands and Mining Resources" (Sections 2318 to 2352) is a part.

In section 2319, Revised Statutes, Congress has declared that all valuable mineral deposits in lands of the United States are to be free and open to exploration and purchase, and the lands in which such deposits are found, to occupation and purchase by citizens of the United States, under regulations prescribed by law, and according to local customs and rules of miners.

It is provided in section 2320 that:

No location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located.

By section 2322, Congress has provided that locators of all mining locations, their heirs and assigns, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations.

It is clearly contemplated by the provisions of section 2335 that "contests, as to the mineral or agricultural character of land," will arise.

By sections 2329, 2330, and 2331, placer mining locations are provided for, and the segregation of mineral land from agricultural land recognized.

In order "to enforce and carry into execution by appropriate regulations every part of the provisions" of the public land laws, the rules of practice, the mining regulations, and various other regulations, circulars and instructions, from time to time, have been prepared and promulgated under departmental authority, for the guidance of those concerned.

Paragraph 8 of Mining Regulations provides:

No lode claim shall be located until after the discovery of a vein or lode within the limits of the claim, the object of which provision is evidently to prevent the appropriation of presumed mineral ground for speculative purposes, to the exclusion of *bona fide* prospectors, before sufficient work has been done to determine whether a vein or lode really exists.

Paragraphs 99 *et seq.* contain provision relating to hearings before the land department to determine the question of the character of lands, whether mineral or nonmineral.

When such rules and regulations are reasonable and within the purview of the statute and not beyond its scope, they must be respected and obeyed as lawful rules and regulations, and have the force and effect of law. *U. S. v. Eliason* (16 Peters, 291, 302); *Boske v. Comingore* (177 U. S., 459); *Dastervignes v. U. S.* (122 Fed., 30), and *Shannon v. U. S.* (160 Fed., 870).

In departmental letter of July 5, 1906, addressed to the Secretary of the Department of Agriculture, which is commented upon at length by counsel for claimants, after a discussion and citation of numerous authorities, the following opinion is expressed:

There would seem to be no good reason, however, why the character of lands in forest reserves, located and claimed under the mining laws, may not be determined by the land department in the absence of entry or application for mineral patent, where such determination appeared to be necessary to the due and proper administration by your department of the laws providing for the protection and maintenance of such reserves. The land department unquestionably has jurisdiction over any and all lands embraced within such locations for the purpose of determining whether they are of the character subject to *occupation and purchase* under the mining laws.

Since that time essentially similar views have been reiterated in the regulations of May 3, 1907 (35 L. D., 547), and the circulars of

June 26, 1907 (35 L. D., 632), and June 23, 1908 (36 L. D., 535). See, also, instructions of May 15, 1907 (35 L. D., 565).

The complaint or protest presented by the forestry officer is not required to be verified for the reason that the same is considered and treated as an official report of a Government officer, made within the scope of his authority and importing verity to which the sanction of an oath would add nothing. A similar practice has long prevailed in regard to hearings based upon reports and recommendations from special agents of your office.

The jurisdiction, powers, and duties conferred upon the land department, in respect to the public domain, have frequently received the attention of the courts. The following excerpts will serve to indicate the opinion entertained by the Supreme Court of the United States in this regard:

The public domain is held by the Government as part of its trust. The Government is charged with the duty and clothed with the power to protect it from trespass and unlawful appropriation, and under certain circumstances, to invest the individual citizen with the sole possession of the title which had till then been common to all the people as the beneficiaries of the trust. [*United States v. Beebe*, 127 U. S., 338, 342.]

In *Knight v. United States Land Association*, 142 U. S., 161, the supervisory power of the Secretary of the Interior over all matters relating to the sale and disposition of the public lands, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the Government by reason of the laws of Congress or under treaty stipulations, respecting the public domain, was fully considered, and numerous authorities cited. It was declared by Mr. Justice Lamar, speaking for the Court, that the Secretary was clothed with plenary authority as the supervising agent of the Government to do justice to all claimants, and to preserve the rights of the people of the United States, and that he could exercise such supervision by direct orders or by review on appeal, and, in the absence of statutory direction, prescribe the mode in which it could be exercised by such rules and regulations as he might adopt. [*McDaid v. Oklahoma*, 150 U. S., 209, 215.]

The views thus expressed by the Supreme Court of the United States are authoritative and controlling, and support the opinion set forth in the foregoing departmental decisions.

But it is urged by appellants that they are seeking no title from the Government; that they have not applied to purchase or secure patent for the land; that they have not invoked any of the functions of the land department or submitted their claims to its jurisdiction in any manner or by any act on their part.

It will not be inappropriate to briefly examine the nature and extent of the estate possessed by the locator of a valid mining claim situated upon the public domain. Locators, their heirs and assigns are vested with the exclusive right of possession and enjoyment of all the surface included within the lines of their location. (Section 2322, Revised Statutes.) In the event of a failure to perform the

requisite annual assessment work, the claim or mine is open to relocation as if no location had ever been made. (Section 2324, Revised Statutes.) The announced object of the mining laws is to develop the mining resources of the United States.

The courts on numerous occasions have spoken in regard to the rights secured by the locator:

A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent. . . .

The right of location upon mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. . . .

A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations. [*Belk v. Meagher*, 104 U. S., 279, 283, 284.]

When the location of a mineral lode or vein, properly made, is perfected under the law, the lode or vein becomes the property of the locators or their assigns, and the Government holds the title in trust for them. [*Syllabus—Noyes v. Mantle*, 127 U. S., 348.]

See also the later cases of *St. Louis, &c., Company v. Montana Company*, 171 U. S., 650; *Brown v. Gurney*, 201 U. S., 184; *Farrell v. Lockhart*, 210 U. S., 142; *Elder v. Wood*, 208 U. S., 226, and *Bradford v. Morrison*, 212 U. S., 389.

Mr. Lindley, in his work on mines, 2nd edition, section 539, p. 892 *et seq.*, sums up the characteristics of a mining location as follows:

As between the locator and everyone else save the paramount proprietor, the estate acquired by perfected mining location possesses all the attributes of a title in fee, and so long as the requirements of the law with reference to continued development are satisfied, the character of the tenure remains that of the fee. As between the locator and the Government, the former is the owner of the beneficial estate and the latter holds the fee in trust, to be conveyed to such beneficial owner upon his application in that behalf and in compliance with the terms prescribed by the paramount proprietor.

Until the patent issues the locators' muniments of title consist of the laws under the sanction of which his rights accrue, the series of acts culminating in a completed valid location, and those necessary to be continuously performed to perpetuate it.

Such is the high character of the estate vested in a mining locator, and on such rights he must ground his application for a patent when he seeks to obtain the paramount legal title from the Government; yet the appellants earnestly contend that such a claim, the assertion of such rights upon the public lands, when met by the charge that the claim is unlawful and invalid because not made in compliance with law, calls for no investigation and the land department possesses no power or jurisdiction in the premises. No such conclusion is deducible from the statutes or from the authorities above cited, but, on

the contrary, the very opposite conclusion necessarily follows for the decisions cited all contemplate a valid location based on a discovery of mineral.

Again, these claims, about which the present controversy has arisen, are now within the limits of the Plumas National Forest, which is a public reservation established pursuant to law by Executive proclamation.

By the act of June 4, 1897 (30 Stat., 11, 35, 36), Congress, in relation to forest reservations, provided as follows:

It is not the purpose or intent of these provisions or of the act providing for such reservations, to authorize the inclusion therein of land more valuable for mineral therein, or for agricultural purposes, than for forest purposes Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes including that of prospecting, locating and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations. . . .

And any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained.

Congress, by act of February 1, 1905 (33 Stat., 628), entitled "An act providing for the transfer of forest reserves from the Department of the Interior to the Department of Agriculture," enacted that the Secretary of the Department of Agriculture should execute or cause to be executed all laws affecting public lands embraced in forest reservations—

excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands.

The terms of this act clearly contemplate that within forest reserves (now national forests) those laws affecting the surveying, entering, and patenting of lands shall continue as theretofore to be executed by and under the supervision of the Interior Department; and also all such laws as affect *prospecting, locating and appropriating* any such lands. Here is an express Congressional declaration reserving to the land department the execution and enforcement of those laws governing the latter class of acts in the same terms and with no element of distinction as are employed with reference to the former, the departmental jurisdiction over which no one will question. The legislative announcement recognized the right, authority, power, and jurisdiction as already existent and vested and declares that such power and authority shall remain where now seated, viz: with the Interior Department.

Thus it is seen that the broad and general reasoning by which jurisdiction of the land department is established, is emphatically

reinforced by a significant and express declaration of the legislative will which is peculiarly appropriate and applicable in the case now under consideration.

While the foregoing is deemed amply sufficient to warrant and sustain the proposition that the land department possesses full power and authority to investigate and pass upon the questions here in controversy, yet there are other considerations that inevitably lead to a like result. These in passing will be briefly mentioned as suggestive but will not be dwelt upon.

The rights acquired under a valid location are essentially a grant under the laws of Congress upon certain conditions. The administration of grants upon the public domain is exclusively committed to a special tribunal, viz., the land department, unless the contrary expressly and affirmatively appears to be the intention of Congress. *Lake Superior, etc., Company v. Patterson* (30 L. D., 160); *Bishop v. Gibbon* (158 U. S., 155, 167); *Cosmos Company v. Gray Eagle Co.* (190 U. S., 301).

A valid location invests the locator and his successors with the exclusive beneficial use, enjoyment and possession of the mineral land covered by the location, and in so far consummates a *disposal* of those interests in and to such lands and hence the *status* of a location as such falls well within the scope of the jurisdiction of the Department.

In general, discovery, marking on the ground, posting and recording notice, and compliance with law are essential elements in the initiation of rights under a mining claim and constitute the foundation upon which the right of obtaining the legal title is predicated. Many reasons are apparent why the land department, in a proper proceeding, upon due notice, with full opportunity for claimants to be heard, should investigate such matters prior to application for patent, as well as when legal title is sought, if due occasion therefor arises in connection with the administration of laws applicable to the public domain. Clearly the consent or nonconsent of the parties claimant, their invocation of or failure to invoke the jurisdiction of the Department, in no way affect or govern the general question as to jurisdiction over the subject matter, that is to say, the cause of action.

As to public lands not valuable for their mineral deposits within national forests, the forestry reservation attaches absolutely and the Government, through its proper executive officers, is entitled to the free and unrestricted possession and control of such area and the timber growing thereon, in order to properly administer the same as the law directs. Mining claims not asserted in good faith and not based upon any sufficient discovery of mineral interfere with and infringe upon the governmental right of possession, control and

administration. In such cases a determination as to the character of the land and the validity of locations becomes essential and that duty devolves upon the land department. In a national forest, the Government occupies a position, so far as the mining claimant is concerned, very similar to that of an individual claimant upon the open public domain under any of the nonmineral land laws, and the Government is not without its remedy any more than the individual, when rights under the law are not respected.

Again, if the asserted placer locations are without proper foundation and are unlawful, as is alleged, and if, as the record indicates, these claimants have constructed telephone lines, wagon roads, trails, ditches, dams, and reservoirs within the national forest without proper application having been made therefor and requisite authority granted in that behalf by the proper officer, pursuant to the statutes and regulations governing those matters, such construction work within the reserve is unlawful and constitutes a trespass, merely colorable mining locations affording no protection for such unwarranted intrusion and unlawful invasion upon the territory of the national forest. The investigation of these matters is clearly cognizable before the land department in order that the actual facts and circumstances may be ascertained and declared and that such further and appropriate action may be taken in regard thereto as will secure compliance with and enforcement of the laws and regulations controlling such works.

In support of their contention as to the lack of jurisdiction, counsel for appellants direct attention to the practice in regard to pre-emption declaratory statements, and assert that a contest against such a filing was not permitted prior to the offering of proof, and cite *Sprague v. Robinson* (1 L. D., 469) and *Guyselman v. Schafer et al.* (3 L. D., 517).

Counsel also rely upon the case of *Nome and Sinook Co. et al. v. Townsite of Nome* (on review, 34 L. D., 276), wherein the following expressions are found:

In the decision complained of the Department held in substance and effect . . . (3) that, in the absence of applications for patent by the protestant the Department is without authority to determine any question relating to their rights as against the townsite claimants.

The cases cited by counsel apparently proceed upon the theory that the hearing sought was unnecessary, inexpedient and undesirable as a matter of administrative policy, rather than that no general jurisdiction existed in the land department to enter upon an investigation. The disclaimer of jurisdiction in the *Nome-Sinook* decision was not necessary to the disposition of that case. The Department is not unaware that expressions of similar import are to be found in other cases. But, after a careful examination of the authorities

and full consideration of the question, the Department is of opinion that it has jurisdiction over the subject matter of the present investigation.

There arises upon the record a further question of law which merits consideration. The locations involved were made by eight persons and in most instances embrace 160 acres of land, or approximately such area. So far as the evidence shows, no discovery of mineral was made prior to the making of the "paper" locations, that is, the posting and recording of the notices of location. These claims, in the majority of instances, were transferred either to H. H. Yard or to the North California Mining Company, a corporation. The appellants maintain that, even if no discovery was made before the locations, any subsequent discovery operated to validate the claims. Such alleged subsequent discoveries occurred as is shown by the evidence, during the spring and summer of 1907, and at a time when the asserted locations were claimed and owned either by Yard or the company. Does a discovery under such circumstances serve to validate a claim of 160 acres? It is conceded that a single discovery upon a maximum placer location held by eight persons is primarily sufficient to sustain the location, but the eight associated persons are absolutely essential to the initiation and completion of such a location. When an asserted placer claim of 160 acres, which is invalid, being without a discovery, is transferred to a single individual, it is inconceivable that he alone can perfect such a location by making a subsequent discovery, seven associates being necessary to initiate and perfect a valid location thereof. The same situation arises as to a claim of maximum area held by a corporation which is in legal contemplation an entity, in which all property rights under the location are vested, the individual shareholders not being co-owners with the corporation or with each other in the corporate property. Repeater and Other Lode Claims (35 L. D., 54). In the opinion of the Department there is no basis for the theory that a subsequent discovery works the validation of a placer claim where the area of the claim exceeds that which the then holders can locate in the first instance. The contrary doctrine would not be within the purview of the statute, but entirely beyond its scope and unauthorized.

The appellants also argue that discovery operates by relation back to the initial steps and validates the location from that date, in the absence of intervening rights. This the Department cannot concede. The correct statement is believed to be in substance that when all other initial steps are taken and discovery occurs later, it is at that time and not before that a valid and completed location springs up, all the prerequisites having at that point concurred. The locator's rights flow from his discovery and his rights do not arise before or antedate discovery, which is the primary source of his title. Creede

etc. Company *v.* Uinta Tunnel Company (196 U. S., 337) and the numerous authorities there cited. It then follows that if at the time rights would otherwise accrue, the holder of a placer mining claim who, as has been shown, cannot invoke the doctrine of relation, is incapable of making a location embracing more than 20 acres, he cannot, by the very reason of such incapacity, assert or maintain that his claim exceeding such area is validated by the subsequent discovery, for, as an individual, he is prohibited by the law from locating more than 20 acres.

The appellants also urge that as prospectors they are guaranteed by law the privilege of prospecting and exploring upon any part of the public domain so long as they see fit without let or hindrance, provided they comply with the laws and regulations, and that this proceeding infringes and abridges such right. There is no charge affecting prospecting or exploring in the notices of hearing issued. The attack is directed against certain alleged invalid placer mining locations. Whatever finding is made as to such locations will not in any manner abridge the rights of appellants to prospect and explore upon the public domain on equal terms with all other prospectors. Appellants, however, have no right to interpose barriers or to assert within the national forests or elsewhere merely colorable mining claims in order supposedly to secure or protect their rights as mere prospectors and explorers.

Appellants insist upon certain formal and technical objections interposed to depositions taken on behalf of the Government at Quincy, California, and urge that these depositions are no part of the record because they were not read or offered in evidence at the hearing. The objections have been considered. Notices to take these depositions were regularly issued and served. Counsel representing appellants appeared and cross-examined the Government witnesses and produced and examined witnesses on behalf of the defense. The matters objected to did not deprive appellants of full opportunity to be heard or of any substantial rights in the premises.

Neither in their printed brief nor in oral argument did counsel for the claimants attempt an analysis or discussion of the evidence adduced at the hearing. They have not, in their specifications of error, assigned any particulars or pointed out wherein the evidence is contrary to, or insufficient to support, the findings. Unless the findings and conclusions reached below are clearly perceived to be contrary to the evidence, they are to be sustained.

The voluminous record, particularly the testimony, has been examined and carefully scrutinized. As against the Government's *prima facie* showing as to the nonexistence of valuable placer deposits within these claims, the appellants have made no serious attempt to show affirmatively the mineral character of the lands

claimed. They did undertake to show that shortly before the hearing discoveries, which are claimed by them to be sufficient, were made upon many of these locations. Such purported discoveries consisted of obtaining by panning, from favorable places, from one to several colors of gold which were mostly angular or "quartz" colors.

As to what constitutes a sufficient discovery under the mining laws numerous authorities may be cited. The following principle has been stated by the Department in *Castle v. Womble* (19 L. D., 455, 457) :

where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine, the requirements of the statute have been met.

In a case peculiarly applicable in the present controversy, the Circuit Court of Appeals for the Ninth Circuit, in *Steele v. Tanana Mines R. Co.* (148 Fed., 678), made the following statement:

The sum and substance of this evidence is, not that gold had been discovered on the claim in such quantities as to justify a person of ordinary prudence in further expending labor and means with a reasonable prospect of success, but that colors of gold had been found which were fairly good prospects of gold. Doubtless, colors of gold may be found by panning in a dry bed of any creek in Alaska, and miners, upon such encouragement, may be willing to further explore in the hope of finding gold in paying quantities. But such prospects are not sufficient to show that the land is so valuable for mineral as to take it out of the category of agricultural lands and to establish its character as mineral land when it comes to a contest between a mineral claimant and another claiming the land under other laws of the United States.

See also the case of *Chrisman v. Miller* (167 U. S., 313) and the cases there cited.

Charged as it is with the duty of administering the public domain and with disposing of lands therein to qualified applicants under the laws appropriate thereto, it is incumbent upon this Department to see that the public lands are not withheld from use by the Government or from acquisition by proper applicants, through invalid locations, filings or entries made without proper foundation and held without due compliance with law. While it is true, as urged by appellants, that this Department has not the judicial authority to remove locators from their invalid claims, it has the power to declare such claims void and to refuse thereafter to recognize them as the basis for proceedings in the land department, and this course is not only required as a matter of administration but, as above indicated, is a power conferred by implication by those laws which charge this Department with the proper disposition of the public lands.

Upon a review of the entire record, the Department finds no ground upon which to disturb the concurring findings and conclusions of the local officers and your office. The locations were not founded upon

the discovery required by the mining laws and have at no time since been validated by such a discovery, even were the latter course legally possible under the claimed present ownership. It is therefore adjudged that the asserted mining locations were and are wholly null and void, and the lands covered thereby will be administered as part of the public domain, subject to the reservation for forest purposes, without regard to the so-called locations.

The decision of your office is accordingly affirmed.

**SOLDIERS' ADDITIONAL—CERTIFICATE—RECERTIFICATION—ACT OF
AUGUST 18, 1894.**

D. N. CLARK.

An invalid certificate of soldiers' additional right never transferred but destroyed in the hands of the original holder was not validated by the act of August 18, 1894, and the land department is without authority to recertify such right.

*First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) Land Office, July 7, 1909. (J. H. T.)*

A motion for reopening and for reconsideration of departmental decision of May 14, 1908, denying motion for review of departmental decision of December 10, 1907, affirming the action of your office in refusing to recertify the alleged soldiers' additional homestead right of Samuel R. Grier, by D. N. Clark, who claims as assignee of said Grier.

Samuel R. Grier made homestead entry at Springfield, Missouri, January 22, 1867, for the SW. $\frac{1}{4}$, NW. $\frac{1}{4}$, Sec. 29, T. 30 N., R. 19 W., which was patented November 1, 1873. He also performed military service in Company G, Phelps County Regiment, Missouri Home Guards. May 15, 1878, a certificate in evidence of his additional homestead right under section 2306, R. S. U. S., based upon the said homestead entry and military service in the said organization, was issued to Grier. March 4, 1907, Grier made application for the re-issuance and recertification of the alleged additional right under said certificate, furnishing evidence that the certificate was destroyed in his sight, and on March 8, 1907, he assigned his alleged right to T. K. Paul, who, on September 18, 1907, assigned to D. N. Clark, the claimant herein.

November 14, 1907, you denied the application of Clark, upon the ground that the service rendered by Grier in the Missouri Home Guards is not such military service as furnishes a basis for an additional right under section 2306, R. S., citing the case of Edgar A. Coffin, 32 L. D., 44.

The claimant bases his present motion upon departmental decision of March 16, 1909 (unreported), in the case of D. N. Clark, Assignee of Cornelius B. Brackett. In his argument in support of the motion he states:

It is respectfully submitted that this case is legally identical with the case of Cornelius B. Brackett. In that case, as in this, the certificate issued upon defective military service. In the Brackett case the service was for only eighty-eight days, while in this case, under the Hair decision (32 L. D., 44), there was no service. It is submitted that there can be no distinction between this case and the Brackett case so far as the service is concerned. One defective service is just as defective as another in the eyes of the law. As the Brackett case was defective, and the Department has decided that notwithstanding such defect the certificate was validated by the act of August 18, 1894, it follows, in legal reasoning, that the same act validated this certificate upon defective service.

There can be no question that the certificate issued to Grier was invalid in its inception and wrongfully issued, inasmuch as the military service upon which it was based was not such service as is recognized to support a claim for additional right under section 2306, R. S. (See case of Edgar A. Coffin, 32 L. D., 44, and cases therein cited.) It is insisted, however, that said certificate is validated by the act of August 18, 1894 (28 Stat., 397-8). Said act provides:

That all soldiers' additional homestead certificates heretofore issued under the rules and regulations of the General Land Office under section twenty-three hundred and six of the Revised Statutes of the United States, or in pursuance of the decisions or instructions of the Secretary of the Interior, of date March tenth, eighteen hundred and seventy-seven, or any subsequent decisions or instructions of the Secretary of the Interior or the Commissioner of the General Land Office, shall be, and are hereby, declared to be valid, notwithstanding any attempted sale or transfer thereof; and where such certificates have been or may hereafter be sold or transferred, such sale or transfer shall not be regarded as invalidating the right, but the same shall be good and valid in the hands of bona fide purchasers for value; and all entries heretofore or hereafter made with such certificates by such purchasers shall be approved, and patent shall issue in the name of the assignees.

In the Brackett case above referred to, the soldier performed only eighty-eight days' military service, and therefore was not entitled to an additional homestead right based thereon, under section 2306, R. S., but as a certificate had been issued, it was held that the same was validated by the act of 1894, *supra*, and that therefore the right should be recertified to the assignee, Clark. The original certificate issued to Brackett November 28, 1877, and on October 25, 1907, he assigned his right to Clark, and furnished evidence of the loss of the original certificate. It was shown that no other assignment had been made of the certificate or of the original right.

Neither in this case, nor in the Brackett case, was any assignment made prior to the loss or destruction of the certificate. In this case the certificate was *destroyed* prior to the date of the act of August

18, 1894, while in the Brackett case the certificate was *lost* prior to said date and its whereabouts unknown.

However, the Department is of the opinion that the act of August 18, 1894, *supra*, did not validate certificates in the hands of the soldier, but only in the hands of a *bona fide* purchaser. The object and purpose of the act is fully set forth in the case of John M. Rankin (21 L. D., 404), wherein it was stated that "with full information on this subject, Congress validated all certificates which had been issued and found in the hands of *bona fide* purchasers, and validated all such transfers." It was further stated: "and he is a *bona fide* purchaser who bought without notice of illegality of the certificate at its inception, or of its invalidity for any other reason."

There could have been no object in declaring such certificates valid as long as they remained in the hands of the person (soldier) to whom they issued. It was only to protect a purchaser that they were validated "in the hands of *bona fide* purchasers for value." If, therefore, a certificate which was invalid in its inception, because not based upon proper military service, or for any other reason, is destroyed prior to transfer, the act of 1894, *supra*, is inoperative to validate it. And such certificate having been destroyed could not "be sold or transferred," and could not be "in the hands of" a purchaser.

In the case under consideration, the certificate never was in the hands of a *bona fide* purchaser. It was not, therefore, validated by the act of 1894, and the alleged right should not be recertified, nor any rights whatever recognized, under section 2306, R. S., based upon the said military service. In the case of Henry N. Copp (23 L. D., 123) it was held (syllabus):

In view of the provisions of the act of August 18, 1894, validating outstanding soldiers' additional certificates in the hands of *bona fide* purchasers, a duplicate certificate may issue to such a purchaser in the name of the soldier on due showing of the loss of the original and the further fact that it has not been located.

In that case, however, it appears that the certificate was valid, and, furthermore, it had been transferred prior to its loss. Therefore, said decision is not in conflict with the ruling herein made. In fact, the motion is based mainly upon the decision in the case of Brackett. It is not believed that the Brackett decision was correct in so far as it held that the certificate, under the circumstances therein shown, was validated by the act of 1894. Said decision will not, therefore, be followed.

The motion is accordingly denied.

RIGHT OF WAY—SURVEY BY DISQUALIFIED CORPORATION—ACT OF MARCH 3, 1875.**COCHISE ELECTRIC R. R. CO. v. ARIZONA SOUTHERN CO.**

Where the laws of a State or Territory declare that every act done by a foreign corporation within said State or Territory prior to filing its articles of incorporation therein as provided by law shall be null and void, such corporation can acquire no rights within that jurisdiction under the act of March 3, 1875; by the survey of a right of way prior to the filing of its articles of incorporation in compliance with such State or Territorial laws.

First Assistant Secretary Pierce to the Commissioner of the General
(O. L.) *Land Office, July 15, 1909.* (G. B. G.)

This is the appeal of the Arizona Southern Company from your office decision of December 11, 1908, rejecting its application under the act of March 3, 1875 (18 Stat., 482), for conflict with the application of the Cochise Electric Railroad Company under the same act, for railroad right of way from a point in unsurveyed section 35, T. 23 S., R. 24 E., to a point on the west line of section 12, T. 24 S., R. 27 E., a distance of 19.418 miles, in Phoenix, Cochise county, land district, Arizona.

It appears that the appellant, the Arizona Southern Company, was organized under the laws of the State of Minnesota, and that in accordance with such laws it filed its articles of incorporation in the office of the Secretary of State at St. Paul, April 29, 1908, and on May 14, 1908, filed such articles of incorporation in the office of the auditor for the Territory of Arizona.

The appellee, the Cochise Electric Railroad Company, was organized under the laws of the Territory of Arizona and filed its articles of incorporation in the office of the auditor for said Territory, April 16, 1908.

The Arizona Southern Company's survey of the line in question was begun April 17, 1908, and finished May 2, 1908. It was therefore made before the filing of that company's articles of incorporation, as required of a foreign corporation before it is authorized to do business in said Territory.

Section 909 of the Revised Statutes of the Territory of Arizona provides, among other things, that before a foreign corporation shall carry on any business in said Territory it shall file a certified and duly authorized copy of its articles of incorporation or charter with the secretary of the Territory.

Section 911 of such statutes is as follows:

No corporation such as is mentioned in section 149 [909] of this title, shall transact any business whatsoever in this Territory until and unless it shall have first filed its articles of incorporation and appointment of an agent as required in the two preceding sections, and every act done by it prior to the filing thereof shall be utterly void.

In view of this statute, every act done by this company prior to May 14, 1908, was and is utterly void. Its survey was therefore as though it had never been made. See *Washington and Idaho Railroad Co. v. Coeur d'Alene Railway Co.* (160 U. S., 77).

If it be admitted, as argued upon appeal, that the law had been complied with before the day upon which the Cochise Electric Railroad Company adopted the survey of its line of road, still it can not well be said that this circumstance furnishes any substantial ground for holding that the Arizona Southern Company has the better right. It is well settled that the legislative power of a State or Territory has the right to prescribe the conditions upon which a foreign corporation may engage in business, other than interstate commerce, within that jurisdiction, and inasmuch as at the time the right of the Cochise Electric Railroad Company, by virtue of its incorporation and its survey, attached to the line in question, the Arizona Southern Company had not complied with the laws of the Territory, it had, so far as that jurisdiction is concerned, no corporate existence. The decision of the Supreme Court in the case of *Washington and Idaho Railroad Company v. Coeur d'Alene Railway Company*, *supra*, is, therefore, peculiarly apt.

The decision appealed from is affirmed.

HUGH STEPHENSON OR BRAZITO GRANT.

Motion for review of departmental decision of March 29, 1909, 37 L. D., 509, denied by First Assistant Secretary Pierce, July 15, 1909.

SANTA TERESA GRANT.

Motion for review of departmental decision of March 9, 1909, 37 L. D., 480, denied by First Assistant Secretary Pierce, July 16, 1909.

TIMBER CUTTING—MINERAL LAND—CALIFORNIA—ACT OF JUNE 3, 1878.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 17, 1909.

THE COMMISSIONER OF THE

GENERAL LAND OFFICE.

SIR: Under date of March 31, 1909, you asked the instructions of this Department concerning the scope of an act relating to the re-

moval of timber from mineralized public lands, viz., the act of June 3, 1878 (20 Stat., 88). The practical question is: Does said act relate to such lands situate in the State of California, or is it confined to the States and Territories expressly enumerated in the act itself—Colorado, Nevada, New Mexico, Arizona, Utah, Wyoming, Idaho, Montana, and the Dakotas?

Departmental construction heretofore has uniformly been to the effect that the expression "and all other mineral districts of the United States," following the enumeration of States and Territories in said act, is sufficiently comprehensive to include the States of California, Oregon and Washington. (Instructions, 29 L. D., 349; 24 L. D., 167.)

This construction is more favorable to the individual than that which has obtained in the United States courts for California and Oregon. (*United States v. Smith*, 11 Fed. Rep., 487; *United States v. Benjamin*, 21 Fed. Rep., 285.) In these cases the courts held that said act does not apply to Oregon (*United States v. Smith*) nor to California (*United States v. Benjamin*). The courts were persuaded that another act of the same date (20 Stat., 89) defined the rights of residents of the Pacific coast states in the removal of timber from the public domain.

Both cases were considered by the Department in its previous instructions, the last (29 L. D., 349) being under date of December 14, 1899.

Since this date, however, a Federal court has again had occasion to construe the act. In *United States v. English et al.* (107 Fed. Rep., 867) it was held, in effect, that "other mineral districts of the United States," does not enlarge the field of operation of the act, because Oregon (and the same is true of Washington and California) is not "a mineral district."

The line of demarcation thus established, in considering the territorial operation of either act, was again observed in *United States v. Price Trading Co.* (109 Fed. Rep., 239).

While the subject was not immediately considered by the Supreme Court in *Northern Pacific Ry. Co. v. Lewis* (162 U. S., 366), yet the language of Mr. Justice Peckham may not be without significance. In speaking of the act he said (p. 376):

The government, however, chose to make some exceptions in favor of certain classes of people to whom was given the right to cut timber for certain purposes: 1st. They were to be citizens of the United States. 2nd. *Bona fide* residents of the State or Territory mentioned in the act.

The construction by the courts, whenever the matter has been presented, is more restrictive than that given by the Department. The effect is a paradox. The Department, holding to a more liberal construction recognizing in residents of California, Oregon and Wash-

ington the same rights that the act of June 3, 1878, expressly confers upon residents of the other States and Territories therein named, may nevertheless instigate suits or prosecutions for the cutting or removal of timber in the mineralized portions of those three States, which the Federal courts will sustain.

Without further consideration of the question *in thesi*, and without relation to whether the administrative or the judicial construction better expresses the legislative intent, it is now idle to insist upon an interpretation which confers no defense to a prosecution before a Federal court.

The instructions heretofore given are therefore vacated and withdrawn, and you will henceforth so administer the act in question as to exclude from its purview any State or Territory not specifically therein mentioned.

Very respectfully,

FRANK PIERCE,
First Assistant Secretary.

NORTHERN PACIFIC GRANT—JURISDICTION OF LAND DEPARTMENT—
JOINT RESOLUTION OF MAY 31, 1870.

HEATH v. NORTHERN PACIFIC RY. CO.

While the joint resolution of May 31, 1870, provides that all lands thereby granted to the Northern Pacific Railway Company which shall not be sold or disposed of, or remain subject to mortgage, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption, the land department is without authority, in the absence of specific legislation, to authorize the sale or entry of any such lands which have been earned by the company and are still held by it. Where such lands have been patented to the company the jurisdiction of the land department has terminated, and where earned but not patented it is the duty of that department to issue patents therefor, leaving for determination by the courts questions arising under said provision.

First Assistant Secretary Pierce to the Commissioner of the General
(O. L.) *Land Office, July 17, 1909.* (S. W. W.)

This case involves the construction of the joint resolution of May 31, 1870 (16 Stat., 378), making a grant of lands to aid in the construction of that portion of the Northern Pacific Railroad from Portland to a point on Puget Sound, and is brought before the Department by the appeal of Melvin Heath from your office decision of November 14, 1908, affirming the action of the register and receiver rejecting his homestead application for lot 1, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 5, T. 5 N., R. 3 E., Vancouver, Washington, land district.

It appears that the lands involved herein are within the primary limits of the grant made by the joint resolution aforesaid on definite

location of September 22, 1882, and were listed by the company August 6, 1895, per list No. 56, but no patent appears to have been issued, and when on May 11, 1908, Heath presented his homestead application, it was rejected by the register and receiver for the reason of conflict with the railroad company's claim.

In his appeal to your office the homestead applicant contended that the railway company was violating the terms of the grant made by the act of July 2, 1864 (13 Stat., 365), and the joint resolution aforesaid in that more than five years had elapsed since the completion of the road and the company was holding the land in violation of the express terms of the joint resolution which provided:

That the Northern Pacific Railroad Company be, and is hereby authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property, and rights of property of all kinds and descriptions, real, personal and mixed, including its franchise as a corporation; and, as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior; and also to locate and construct under the provisions and with the privilege, grants and duties provided for in its act of incorporation, its main road to some point on Puget Sound, *via* the Valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound.

And that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by the first day of January, Anno Domini Eighteen Hundred and Seventy-two, and forty miles of the remaining portion thereof each year thereafter, until the whole shall be completed between said points: *Provided*, That all lands hereby granted to said Company, which shall not be sold or disposed of, or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like all other lands, at a price to be paid to said company, not exceeding two dollars and fifty cents per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceedings, or the mortgaged lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity, or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder.

Your office decision holds that by reason of regular proceedings had in the courts whereby all the property of the Northern Pacific Railroad Company, including the land grant, was sold to the Northern Pacific Railway Company, the lands granted to the company are no longer subject to the provision relied upon by the appellant; and that moreover, whether such lands are subject to preemption or not, there is no authority in the officers of the land department of the United States to accept payment for the lands or to allow entry

thereof, citing as authority the decision of the Department in the case of *Cooper et al. v. Sioux City and Pacific Railroad Company* (9 C. L. O., 217; 1 L. D., 345).

The material facts concerning which there can be no controversy may be briefly stated as follows:

The original Northern Pacific Railroad Company was created by the act of Congress of July 2, 1864, *supra*, and by the same act certain lands were granted to said company "its successors and assigns" (section 3); and for these lands patents were to be issued to said company confirming the title as the lines should be completed in sections of 25 miles (section 4).

By section 10 of the act the issue of mortgage or construction bonds was forbidden except upon the consent of Congress, but by the joint resolution of March 1, 1869 (15 Stat., 346), Congress granted the company authority to issue bonds and secure the same by mortgage on its railroad and telephone line, and by the joint resolution of 1870, *supra*, authority was granted the company to mortgage its property "of all kinds and descriptions, real, personal and mixed, including its franchise as a corporation." Bonds were thereafter issued secured by mortgage, which were foreclosed in 1875, on suit instituted by the trustees in the United States Circuit Court, Southern District of New York. Under an amended decree rendered by that Court August 6, 1875, all the property of the corporation including its franchises (except lands which had at that time been patented or certified to the company and with which this case is not concerned) was ordered sold and was purchased by a committee of the bond holders who reorganized the company as the Northern Pacific Railroad Company under a statute of the State of New York, and conveyed all the property so purchased to the reorganized company. Thereafter other mortgages were issued from time to time and money raised with which the road was completed and put into operation.

In 1896 a second foreclosure sale took place under a decree of the United States Circuit Court of the Eastern District of Wisconsin, whereby the Northern Pacific Railway Company, a corporation organized under the laws of the State of Wisconsin, became the purchaser and has ever since claimed ownership of the entire road, including the lands and land grants. By the terms of the decree under which this sale was made the lands in the State of Washington which had been patented to or selected by the company were sold in separate tracts, by specific description, while the lands not selected "including every possible right, title and interest of said railroad company in and to any of the lands within said State covered by any grant to said railroad company by the Congress of the United States and which may not be included in the sale under said decrees under the foregoing description of lands for which letters patent have

issued to said railroad company and the right to receive lands for which letters patent have not issued but have been selected by and certified to said company," were sold as one parcel.

The land involved in this case was surveyed in April, 1894, as shown by the township plat approved October 10, 1894, and the construction of that part of the road coterminous therewith was accepted by the President on October 4, 1883.

Counsel for appellant have submitted elaborate arguments in support of their contention which they claim are applicable not only to this case but to many others similarly situated and now pending before the Department, which arguments may be summarized as follows: that the Northern Pacific Railway Company is not only the successor of the Northern Pacific Railroad Company but it is in fact the latter company by a new name; that by the purchase under the foreclosure of 1875 the New York company acquired no title to any lands in the State of Washington, but merely the right to earn such lands by complying with the requirements of the laws of Congress making grants, and thus the New York company took the lands to be thereafter acquired, subject to all the conditions specified in the laws; that the sales made under the foreclosure proceedings were not in accordance with the provisions of the joint resolution of 1870 in that the lands were not sold at different places in the State and "in single sections or subdivisions thereof;" that the mortgage executed in 1870 exhausted the right of the company conferred by the joint resolution to mortgage the lands and consequently all subsequent mortgages were invalid; that more than five years having elapsed since the completion of the road and the land involved herein not having been sold or disposed of by the company is subject to preemption; and that the land department of the United States has authority without additional legislation to issue regulations providing for the entry under the homestead laws of the lands now remaining unsold upon the condition of payment for the same at \$2.50 per acre, which the Government should in turn pay over to the railway company.

This Department is thus asked to determine the effect of the legal proceedings had in the United States Circuit Court for the Southern District of New York whereby the mortgage of 1870 was foreclosed and whether the execution of that mortgage exhausted the right to mortgage which was granted by Congress; to determine the right acquired and the obligations assumed by the reorganized Northern Pacific Railroad Company under the New York statute; to determine the validity of the mortgages issued by the reorganized company and the legality of the proceedings had in the United States Court for the Eastern District of Wisconsin for the foreclosure of such mortgages and the effect of the sale had in pursuance thereof.

Upon the assumption that the Department will reach the conclusion that the Northern Pacific Railway Company is actually but a new name for the original corporation created by the act of Congress of 1864, and thus, while entitled to all the benefits and privileges granted by the laws, is also under all the obligations imposed thereby, the appellant asks that regulations be issued providing for the entry of all lands found by the Department to have been earned by the railway company and of which it has made no sale or other disposition.

In support of these contentions counsel for appellant rely upon the decision of Secretary Schurz rendered July 23, 1878 (5 C. L. O., 69), in the case of Nelson Dudymott, construing the somewhat similar provisions of the act of July 1, 1862 (12 Stat., 489), making a grant to the Leavenworth, Pawnee and Western Railroad Company, and claim that a later decision of Secretary Teller in the case of Cooper *et al. v. Sioux City and Pacific Railroad Company*, *supra*, did not properly construe the decision of the Supreme Court in the case of Platt *v. The Union Pacific Railway Company* (99 U. S., 48).

It is true that the Secretary's decision in the Dudymott case held that under the third section of the act of July 1, 1862, *supra*, any of the lands donated to the Kansas Pacific Railroad Company, not sold by said company within three years from the completion of said road, should be sold by the General Land Office to actual settlers under the preemption laws at \$1.25 per acre, the money to be paid to the company. But after the decision of the Supreme Court in the case of Platt *v. Union Pacific Railroad Company*, *supra*, the Department's decision in the Cooper case was rendered, in effect overruling the Dudymott case. It thus appears that the latest decision of the Department upon this subject is adverse to appellant's contentions, but, in view of the earnestness with which the matter is again presented, the Department has carefully considered all the questions involved, realizing the importance of the same and the possible immense value of the property involved.

There seems to be much force in appellant's contention that the foreclosure sale under the proceedings had in New York in 1875, whereby the railroad and its franchises, including the right to earn lands granted by Congress, did not amount to the disposal of the land within the meaning of the joint resolution of 1870, because in that case the Court specifically held that it was an impossibility to sell lands earned by the company which had not been surveyed and that lands which had been surveyed but not certified to the company could not be sold, because the claim or interest of the company in or to such lands had not been ascertained so as to determine what parcel or parcels thereof might inure to the company under the conditions and provisions of the charter. (See 25 Opinions of the Attorney

General, 401, 405.) But it does not necessarily follow that the subsequent sale under the foreclosure proceedings in Wisconsin also failed to operate as a disposal of the lands within the meaning of the joint resolution, because under those proceedings all the lands which had been patented to or selected by the company were ordered to be sold in the manner prescribed by the terms of the joint resolution, and evidence has been submitted on behalf of the company showing that the land involved herein was sold in accordance with the decree.

However, whatever may have been the effect of the various mortgages and the legal proceedings and sales resulting therefrom, and whatever may have been the effect of the failure of the Government to survey the lands promptly and its interference to that extent with the sale of the lands by the company, and whatever may have been the effect of such additional legislation as the act of July 1, 1898 (30 Stat., 597, 620), whereby the company's right to dispose of its lands was further curtailed (*Humbird v. Avery*, 195 U. S., 480), it is obvious that this Department may not, in the absence of specific legislation, authorize the sale or entry of lands which are admitted to have been earned by the company and to which under the plain letter of the law it is the duty of the Department to issue confirmatory patents.

Lands granted by Congress to aid in the construction of railroads do not revert after condition broken until a forfeiture has been asserted by the United States either through judicial proceedings instituted under authority of law for that purpose or through some legislative action legally equivalent to a judgment of office found at common law (*St. Louis, Iron Mt. & Southern Railway Company v. McGee*, 115 U. S., 469, and cases cited). See also *Bybee v. Oregon C. R. Co.*, 139 U. S., 663; and *U. S. v. S. P. R. R. Co.*, 146 U. S., 570. True, appellant claims that no forfeiture results from a breach of condition such as is alleged in this case and that none is sought. At the same time, however, the action desired, if taken, would be tantamount to a forfeiture of at least a portion of the grant, as it is well known that the market value of the better class of lands far exceeds the sum which the appellant offers in payment.

The land department of the United States was constituted by Congress a tribunal with special jurisdiction to determine the questions arising in connection with the administration of the laws providing for the disposition of the public domain and within its scope that jurisdiction is exclusive. See *U. S. v. Schurz*, 102 U. S., 378; *Riverside Oil Co. v. Hitchcock*, 190 U. S., 316. Like courts or other tribunals having only special jurisdiction, the land department may assume to act only where by specific enactment or plain inference therefrom the lawmaking power has granted authority. In the numerous and varied proceedings providing for the acquisition of

title to the public lands many questions are presented which must be determined by this Department and, while there is ample authority for the adjudication of questions so presented, such authority ends with the passing of the title either upon the issue of patent or by other action equivalent thereto. *Michigan Land and Lumber Company v. Rust*, 168 U. S., 589, and cases cited.

Where the equitable title has been earned, as is the case here, it is the duty of the land department to issue the patent, which is but the confirmation of the title granted by the statutes, and leave to the courts the determination of any questions which may arise as to the effect of alleged nonperformance of conditions subsequent. If, as contended by appellant, the joint resolution of 1870 intended that all lands granted thereby to the railroad company which remained unsold five years after the completion of the entire road were to be subject to preemption through the land department of the United States, the legislation entirely failed to make provision for carrying such intention into effect; no officer is designated to receive the money; no provision made for providing for the same; no means provided for ascertaining whether the company has sold the land, and no authority whatever granted for issuing to the preemptor evidence of his purchase.

Moreover, the main purpose of the grant made by the joint resolution was the construction of the road from Portland to some point on Puget Sound and, if Congress also intended by the proviso under consideration that the land remaining unsold five years after the completion of the road should be subject to preemption to the end that the country might be rapidly developed, such latter intention was surely secondary to the main purpose of the grant and if not compatible therewith must yield to such main purpose, and, if necessary, fail entirely. See *Platt v. Union Pacific Railroad Company*. Congress evidently supposed that within five years after the completion of the road all of the lands granted would be surveyed and the entire matter finally settled, while in fact such has not been the case. The road was completed not later than June 10, 1888, and even at the present time the grant has not been finally adjusted and all of the lands have not been surveyed. It is too obvious for argument that the failure of the Government to survey the lands has seriously interfered with the company's ability to finally dispose of the same to advantage because, while it might have been entirely feasible to raise money upon mortgaging the inchoate, indefinite claim to lands generally, it would be wholly impracticable to sell such lands and receive therefor anything like the actual market value of the lands themselves.

As indicated above, this Department has authority to determine all questions arising in the various acts of Congress which provide for

the disposition of the public lands, but when that end has been achieved the jurisdiction of this Department ceases. Applying that principle to this case it may be stated that the Department found it necessary to determine whether or not the Northern Pacific Railway Company was the successor of the Northern Pacific Railroad Company, because that had to be determined in order that the Government might fulfill its part of the contract and issue confirmatory patents for the lands granted to the corporation entitled thereto. To that extent therefore the effect of the various legal proceedings was determined by this Department and it is not believed that the Department is required or authorized to adjudicate the matter further, but that the questions raised by the appellants in this case are such as only the proper judicial tribunals of the country should attempt to adjudicate.

Moreover, the preemption law which was in existence at the date of the grant to this company was repealed by the act of March 3, 1891 (26 Stat., 1097). Appellant claims that the term as used in the repealing statute applied only to the technical preemption act of 1841 and cites decisions of the Department where the term "preemption" has been held to have a much broader meaning than that applied to it in connection with the act of 1841.

In answer to this it is sufficient to state that by section 4 of the act of March 3, 1891, *supra*, not only was the preemption law of 1841 repealed but all other laws allowing preemptions of the public lands of the United States were repealed. See the decision of the Court of Appeals of the District of Columbia in the case of the Menasha Woodenware Company, assignee of William Gribble (37 L. D., 564).

From what has been stated the Department is clearly of the opinion that it should not attempt to issue regulations providing for the entry under any of the public land laws of lands which have been earned by the railway company, and your office decision is accordingly affirmed.

ISOLATED TRACT—CITIZENSHIP—SECTION 2455, REVISED STATUTES.

ANDREW RAFSHOL.

One who has declared his intention to become a citizen of the United States may, if otherwise qualified, purchase an isolated tract under section 2455 of the Revised Statutes.

Directions given for the amendment of paragraphs 2 and 10 of the circular of December 27, 1907, and paragraphs 17 and 25 of the circular of October 28, 1908.

First Assistant Secretary Pierce to the Commissioner of the General
(O. L.) *Land Office, July 28, 1909.* (J. H. T.)

Andrew Rafshol has appealed from your office decision of April 3, 1909, holding for cancellation his cash entry No. 01311, made Sep-

tember 21, 1908, for the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 11, T. 157 N., R. 102 W., 5th P. M., Williston, North Dakota, land district. Rafshol had applied for the offering of said tract at public sale under the isolated tract law, which offering was authorized by your letter of February 20, 1908.

With the papers in the case is a certified copy of Rafshol's declaration of intention to become a citizen of the United States, dated June 1, 1905. No evidence of final naturalization was furnished, and therefore you held the entry for cancellation under section 10 of the circular of December 27, 1907 (36 L. D., 216).

Appellant contends that at the time the offering was authorized the rules of the Department did not require to be furnished final certificate of naturalization, and that the holding of your office is contrary to United States laws governing such cases. It is true that the regulations existing do not require of an applicant any evidence of citizenship, but section 10 of the circular above cited requires such evidence of the purchaser, and the regulation was in force at the time the applicant herein made his application and also at the time of the purchase.

The entry in question was made under section 2455, Revised Statutes, as amended by the act of June 27, 1906 (34 Stat., 517), which provides as follows:

It shall be lawful for the Commissioner of the General Land Office to order into market and sell at public auction at the land office of the district in which the land is situated for not less than \$1.25 per acre, any isolated or disconnected tract or parcel of the public domain not exceeding one quarter section which, in his judgment, it would be proper to expose for sale after at least thirty days notice by the land officers of the district in which such land may be situated: *Provided*, That this act shall not defeat any vested right which has already attached under any pending entry or location.

The said act is silent as to the qualifications which must be shown by a purchaser. The matter of offering is within the discretion of the Commissioner, and the disposal of lands under said act is governed by departmental regulations.

A person who has declared his intention to become a citizen may purchase public land under the mineral law, the timber and stone law, or the commutation provision of the homestead law. In fact, the greater portion of the public domain has been disposed of under former and present laws without requiring of entrymen evidence of full citizenship. It does not appear that public policy requires a greater restriction in the matter of isolated tract sales. If no further objection is found you will pass the entry of Rafshol to patent.

It is further directed that you prepare for my approval instructions to the local officers amending section 2 of the circular of December 27, 1907 (36 L. D., 216), so as to require an applicant thereunder to show

by affidavit that he is a citizen, or has declared his intention to become such, and also amending section 10 of said circular so as to require of the purchaser thereunder evidence of citizenship, or evidence that he has declared his intention to become a citizen. Circular of October 28, 1908 (37 L. D., 225), sections 17 and 25 relating to the sale of isolated tracts in certain portions of the State of Nebraska, should likewise be amended.

This change of practice requires reversal of your decision.

COAL LANDS IN ALASKA—CONSOLIDATION OF CLAIMS.

OPINION.

The benefits of the act of May 28, 1908, authorizing the consolidation of claims or locations of coal lands in Alaska, can be shared only by persons who made such locations in good faith—that is, honestly and lawfully—prior to November 16, 1906, in their own interests individually, without fraud, collusion, or deceit, or any purpose to violate any provision of the law.

If certain agreements or arrangements named, for transferring entries to a company or corporation, were entered into by locators of coal lands in Alaska after they had made their locations in good faith and in their own interest alone, such locations may, under the provisions of the act of May 28, 1908, lawfully pass to entry and patent in accordance with the terms of said act; but if these agreements or arrangements were entered into prior to such locations being made, the locations do not come within the provisions of the act and can not be lawfully passed to entry and patent.

DEPARTMENT OF JUSTICE,

June 12, 1909.

SIR: I have the honor to acknowledge the receipt of your letter dated May 26, 1909, requesting my opinion on certain questions arising in your Department in the administration of the coal-land laws in Alaska.

The general coal-land law is embraced in sections 2347 to 2352, inclusive, of the Revised Statutes. By the act of June 6, 1900 (31 Stat., 658), this law was extended to the district of Alaska. No locations or entries of coal land could be made under this legislation, however, as under said law entries must be made by "legal subdivisions," and the public surveys had not been extended over Alaska. Consequently, the act of April 28, 1904 (33 Stat., 525), amending the act of June 6, 1900, was passed, providing for locations upon and entries of unsurveyed coal lands in Alaska. The procedure under said act was similar to that prescribed by sections 2348, 2349, and 2350, Revised Statutes, for securing a preferential right to enter surveyed coal lands. Section 1 of said act provides that qualified persons or associations—

who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may

locate the lands upon which such mine or mines are situated, in rectangular tracts . . . And all such locators shall, within one year from the passage of this act, or within one year from making such location, file for record in the recording district, and with the register and receiver of the land district in which the lands are located or situated, a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same.

Section 2 prescribes the terms and conditions upon which locators may receive patents for the lands located by them, at any time within three years from the date of the filing the notice of location provided for in section 1.

Section 3 prescribes a method of settling all contests over conflicting claims to such lands, and section 4 provides:

That all the provisions of the coal-land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the district of Alaska.

Under this legislation the ordinary cash coal entry provided for by section 2347, Revised Statutes, could not be made, because the lands had not been surveyed; coal entries in Alaska could be made only by securing the "preferential right" provided for by section 2348, Revised Statutes, by opening and improving one or more coal mines on the land sought. Under section 2349, Revised Statutes, claimants were required to file their declaratory statements with the register of the proper land office within sixty days after taking actual possession of and commencing improvements on the land; under the act of April 28, 1904, locators were given one year "from making such location" within which to file notices of their claims, which notices must be filed both in the proper recording district and with the register and receiver of the proper land office. Under the act of 1904 locators were required to have their claims surveyed in a designated manner, which, of course, was not required under the general coal-land law. Under section 2350, Revised Statutes, claimants were required to make their applications for patent, submit their proofs, and pay for the land within one year from the date of the filing of their declaratory statements. Under the act of 1904 claimants in Alaska were allowed three years from the date of their notices in which to have their surveys made, apply for patents, make their proofs, and pay for the land.

You state that a large number of locations of, and applications for, coal lands were made in Alaska under the act of April 28, 1904. Charges were made by special agents of your Department that in many instances locators of, and applicants for, said lands, entered into agreements, prior to entry, in violation of the provisions of the coal-land laws. November 12, 1906, an order was made withdrawing all lands in Alaska from entry, location, or filing under the

coal-land laws. May 16, 1907, your predecessor issued instructions to the register and receiver of the land office at Juneau, Alaska (35 L. D., 572), providing, in paragraph 2, that all qualified persons or associations "who had within one year prior to November 12, 1906, in good faith, made legal and valid locations under the act of April 25, 1904, may file notices of such locations;" and providing, in paragraph 4, that such persons—

who may have in good faith legally filed valid notices of location under the act of April 28, 1904, prior to November 12, 1906, and the bona fide qualified assignees of such persons, may make entry and obtain patent under such notice within the time and in the manner prescribed by statute, if they have not abandoned their right to do so.

Section 1 of the act of May 28, 1908 (35 Stat., 424), provides:

That all persons, their heirs or assigns, who have in good faith, personally or by an attorney in fact made locations of coal land in the Territory of Alaska in their own interest, prior to November twelfth, nineteen hundred and six, or in accordance with circular of instructions issued by the Secretary of the Interior May sixteenth, nineteen hundred and seven, may consolidate their said claims or locations by including in a single claim, location, or purchase not to exceed two thousand five hundred and sixty acres of contiguous lands, not exceeding in length twice the width of the tract thus consolidated, and for this purpose such persons, their heirs or assigns, may form associations of corporations who may perfect entry of and acquire title to such lands in accordance with the other provisions of law under which said locations were originally made: *Provided*, That no corporation shall be permitted to consolidate its claim under this act unless seventy-five per centum of its stock shall be held by persons qualified to enter coal lands in Alaska.

You request my opinion whether entries may be completed and patents issued under said act of May 28, 1908, upon locations made prior to November 12, 1906, in cases where some one of the following irregular or illegal agreements or conditions existed May 28, 1908:

1. A verbal or written agreement between two or more entrymen, made prior to the initiation of the entry, that upon payment for the land and issuance of a cash certificate, the entries should be transferred to a single company or corporation, and the different entrymen to accept stock in said corporations in payment for the land.

2. A contract conveying said lands to a company or corporation, in which the entryman had or expected to receive stock in payment for the lands.

3. Entries made under an agreement to convey, and conveyance made to a company or corporation, which company or corporation now offers to make cash entry under the act of May 28, 1908, by consolidating the said claims or locations so made.

4. A verbal agreement by two or more entrymen made prior to the initiation of the entry, that upon issuance of patent the entries would be consolidated and mined at the joint expense of each claimant, share and share alike.

The consummation of any of the agreements or contracts mentioned in the first three of the above-quoted paragraphs would have vested in one association or corporation the title to the lands embraced in

several entries, a clear violation of section 2350, Revised Statutes, which provides that "the three preceding sections shall be held to authorize only one entry by the same person or association of persons." (*United States v. Keitel*, 211 U. S., 370, 387-391; *United States v. Trinidad Coal Co.*, 137 U. S., 160.) The agreement described in the fourth paragraph is identical with the one involved in the case of *United States v. Portland Coal and Coke Co.*, decided by the United States circuit court for the western district of Washington, October 5, 1908. In that case Judge Hanford said:

If the scheme was not unlawful, each member of the combination would have a legal right to compel his fellow-members to hold each and every tract for the benefit of all, and to have an accounting of all profits derived from mining operations on each and every tract, although the legal title might be retained by the individual members in severalty. So that the object of the combination was to acquire coal land in excess of 320 acres for an association, although the law fixes the maximum quantity of 320 acres.

In *United States v. Trinidad Coal Co.* (*supra*, p. 167), the Supreme Court applied the following test:

If the facts admitted by the demurrer had been set out in the papers filed in the land office, the patent sought to be canceled could not have been issued without violating the statute.

Likewise, if the facts in reference to any of the above-recited agreements and contracts had been set out in their proof papers when the locators came to make entry of their lands, patents could not have issued, prior to the act of May 28, 1908, without violating the law. If these facts were set out in proof papers now, could patents lawfully issue under the provisions of the act of May 28, 1908?

Certain well-settled rules of statutory construction are applicable to the questions thus presented. A legislative act is to be interpreted according to the intention of the legislation apparent on its face. (*United States v. Fisher*, 109 U. S., 145.) "The intent of the law-maker is the law." (*Jones v. Guaranty, etc., Co.*, 101 U. S., 626.) "The meaning of the legislature constitutes the law." (*Raymond v. Thomas*, 91 U. S., 715.) "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar." (*United States v. Goldenberg*, 168 U. S., 102.) "The legal presumption is that the legislative body expressed its intention, that it intended what it expressed, and that it intended nothing more." (*Johnson v. Southern Pacific Co.*, 117 Fed. Rep., 465.) "Where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction." (*Lake County v. Rollins*, 130 U. S., 670.) "Indeed, the cases are so numerous in

this court to the effect that the province of construction lies wholly within the domain of ambiguity that an extended review of them is quite unnecessary." (*Hamilton v. Rathbone*, 175 U. S., 421.)

Under these rules there is little room for the construction of section 1 of the act of May 28, 1908. It is therein "expressed in plain and unambiguous terms" that all persons, their heirs or assigns, who have in *good faith made locations* of coal lands in Alaska, *in their own interest* prior to November 16, 1906, or in accordance with the circular issued by your predecessor May 16, 1907, *may consolidate their claims or locations* by including in a *single claim, location, or purchase* not to exceed 2,560 acres. And in order to promote such consolidation the statute permits the formation of associations or corporations with the requirement that at least 75 per cent of the stock of such corporations must be held by persons qualified to enter coal lands in Alaska. The operation of said act is clearly limited to locations made prior to November 16, 1906, the date of the withdrawal order above mentioned. It is also clear that its benefits can be shared only by those persons who made coal land locations in *good faith* and *in their own interest* prior to said date.

It is an elementary rule of construction that such words and phrases as "made locations," "in good faith," "claims," "purchase," and "entry" are used in their technical sense if they have acquired one, and in their popular sense, if they have not. (Endlich on Interpretation of Statutes, sec. 2.) Under the coal-land law, "location," "claim," "purchase," and "entry" have acquired well-defined meanings. (*McKibben v. Gable*, 34 L. D., 178.) A location is made by going upon coal land, opening and developing one or more coal mines thereon, and taking possession of the land. The locator's "claim" is thus initiated. It may be preserved by giving the notice required by law. The "purchase" and "entry" are made at the time of final proof and payment, which, in Alaska, may be four years after the location is made.

The phrase "in good faith," as it is used in the law, simply means honestly, without fraud, collusion, or deceit. (*Docter v. Furch*, 91 Wis., 464.) "Good faith" means honest, lawful intent. (*Crouch v. First Nat. Bank*, 156 Ill., 342.) Good faith is the opposite of fraud and of bad faith. (*McConnel v. Street*, 17 Ill., 254.) Therefore, in order to come within the terms of this statute, any given coal land location in Alaska must have been made honestly and lawfully by the locator prior to November 16, 1906, in his own interest alone, without fraud, collusion, or deceit, or any purpose to violate any provision of the law.

Recourse may be had to the reports of committees of either House of the Congress in order to determine the purpose of the Congress in

enacting the law reported upon. (*Binns v. United States*, 194 U. S., 495; *Holy Trinity Church v. United States*, 143 U. S., 464.) The history of the times, the condition of the country, and the circumstances surrounding the enactment of a law should be considered in construing it. (*Shaw v. Kellogg*, 170 U. S., 331; *Mobile and Ohio R. R. v. Tennessee*, 153 U. S., 502; *United States v. Denver, etc., R. Co.*, 150 U. S., 14.) The act of May 28, 1908, originated as S. 6805. In House report No. 1578, Sixtieth Congress, first session, the House Committee on the Public Lands, in reporting on this bill, went into the history and conditions of coal-land locations in Alaska. Among other things this report says:

The object of this bill is to enable coal locators in the District of Alaska to consolidate their holdings in such a way as to make possible the development of the coal fields in that region.

* * * * *
Furthermore, many of the men who made the original coal locations in Alaska were hardy prospectors, who were willing to undergo the hardships and difficulties surrounding prospecting in that region, but many of whom found it difficult to raise the funds for the expense of survey required of each 160-acre tract and the cost of the payment of \$10 an acre on the land.

In order to meet these expenditures it would be necessary for them to make arrangements to secure the funds necessary for survey and payment, and there has been some question as to whether under the present construction of the coal-land law this could be done.

* * * * *
The legislation proposed will enable the pioneers who discovered and prospected these fields to realize upon their claims and will make possible a much-needed development in the Alaska field.

In this report, as well as in Senate report No. 655, on this bill, reference is made to the House report on H. R. 19421, on which extensive hearings were had. From these documents it is evident that the Congress had full knowledge of the existence of the several "irregular or illegal agreements or conditions" mentioned in your letter, then existing in Alaska, and that it was the intent of this legislation to permit such locations to proceed to entry and patent upon the terms and conditions prescribed in said act. Said act being remedial and curative in nature, it should be construed liberally so as to afford all the relief which the language of the act indicates that the Congress intended to grant. (*Beley v. Naphtaly*, 169 U. S., 360, and authorities cited.)

In view of the above considerations I am of the opinion that, if the agreements or arrangements mentioned in your letter were entered into by locators of coal lands in Alaska after they had made their locations in good faith and in their own interest alone, such locations may, under the provisions of the act of May 28, 1908, lawfully pass to entry and patent in accordance with the terms of said

act. On the other hand, I am of the opinion that, if such agreements or arrangements were entered into prior to such locations being made, such locations do not come within the provisions of said act and can not be lawfully passed to entry and patent.

Very respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE INTERIOR.

UNITED STATES LAWS RELATING TO TOWN SITES, PARKS, AND CEMETERIES.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 7, 1909.

COUNTY-SEAT TOWNSITES.

SEC. 2286. There shall be granted to the several counties or parishes of each State and Territory, where there are public lands, at the minimum price for which public lands of the United States are sold, the right of preemption to one quarter section of land, in each of the counties or parishes, in trust for such counties or parishes, respectively, for the establishment of seats of justice therein; but the proceeds of the sale of each of such quarter sections shall be appropriated for the purpose of erecting public buildings in the county or parish for which it is located, after deducting therefrom the amount originally paid for the same. And the seat of justice for such counties or parishes, respectively, shall be fixed previously to a sale of the adjoining lands within the county or parish for which the same is located.

Act approved May 26, 1824 (4 Stat., 50, sec. 1).

TOWNSITES RESERVED BY PRESIDENT.

SEC. 2380. The President is authorized to reserve from the public lands, whether surveyed or unsurveyed, town sites on the shores of harbors, at the junction of rivers, important portages, or any natural or prospective centers of population.

SEC. 2381. When, in the opinion of the President, the public interests require it, it shall be the duty of the Secretary of the Interior to cause any of such reservations, or part thereof, to be surveyed into urban or suburban lots of suitable size, and to fix by appraisement of disinterested persons their cash value, and to offer the same for sale at public outcry to the highest bidder, and thence afterward to be held subject to sale at private entry according to such regulations as the Secretary of the Interior may prescribe; but no lot shall be disposed of at public sale or private entry for less than the appraised value thereof. And all such sales shall be conducted by the register and receiver of the land office in the district in which the reservations may be situated, in accordance with the instructions of the Commissioner of the General Land Office.

Act approved March 3, 1863 (12 Stat., 754).

TOWNSITES PLATTED BY OCCUPANTS.

SEC. 2382. In any case in which parties have already founded, or may hereafter desire to found, a city or town on the public lands, it may be lawful for them to cause to be filed with the recorder for the county in which the same is situated, a plat thereof, for not exceeding six hundred and forty acres, describing its exterior boundaries according to the lines of the public surveys, where such surveys have been executed; also giving the name of such city or town, and exhibiting the streets, squares, blocks, lots, and alleys, the size of the same, with measurements and area of each municipal subdivision, the lots in which shall each not exceed four thousand two hundred square feet, with a statement of the extent and general character of the improvements; such map and statement to be verified under oath by the party acting for and in behalf of the persons proposing to establish such city or town; and within one month after such filing there shall be transmitted to the General Land-Office a verified transcript of such map and statement, accompanied by the testimony of two witnesses that such city or town has been established in good faith, and when the premises are within the limits of an organized land district, a similar map and statement shall be filed with the register and receiver, and at any time after the filing of such map, statement, and testimony in the General Land-Office it may be lawful for the President to cause the lots embraced within the limits of such city or town to be offered at public sale to the highest bidder, subject to a minimum of ten dollars for each lot; and such lots as may not be disposed of at public sale shall thereafter be liable to private entry at such minimum, or at such reasonable increase or diminution thereafter as the Secretary of the Interior may order from time to time, after at least three months' notice, in view of the increase or decrease in the value of the municipal property. But any actual settler upon any one lot, as above provided, and upon any additional lot in which he may have substantial improvements shall be entitled to prove up and purchase the same as a pre-emption, at such minimum, at any time before the day fixed for the public sale.

SEC. 2383. When such cities or towns are established upon unsurveyed lands, it may be lawful, after the extension thereto of the public surveys, to adjust the extension limits of the premises according to those lines, where it can be done without interference with rights which may be vested by sale; and patents for all lots so disposed of at public or private sale shall issue as in ordinary cases.

SEC. 2384. If within twelve months from the establishment of a city or town on the public domain, the parties interested refuse or fail to file in the General Land-Office a transcript map, with the statement and testimony called for by the provisions of section twenty-three hundred and eighty-two, it may be lawful for the Secretary of the Interior to cause a survey and plat to be made of such city or town, and thereafter the lots in the same shall be disposed of as required by such provisions, with this exception, that they shall each be at an increase of fifty per centum on the minimum of ten dollars per lot.

Act approved July 1, 1864 (13 Stat., 343, secs. 2, 3, and 4).

SEC. 2385. In the case of any city or town, in which the lots may be variant as to size from the limitation fixed in section twenty-

three hundred and eighty-two, and in which the lots and buildings, as municipal improvements, cover an area greater than six hundred and forty acres, such variance as to size of lots or excess in area shall prove no bar to such city or town claim under the provisions of that section; but the minimum price of each lot in such city or town, which may contain a greater number of square feet than the maximum named in that section, shall be increased to such reasonable amount as the Secretary of the Interior may by rule establish.

SEC. 2386. Where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town-lots to be acquired shall be subject to such recognized possession and the necessary use thereof; but nothing contained in this section shall be so construed as to recognize any color of title in possessors for mining purposes as against the United States.

Act approved March 3, 1865 (13 Stat., 530, sec. 2). (See sec. 2392, Rev. Stats., and sec. 16, act of March 3, 1891, 26 Stat., 1101, *infra*.)

TOWNSITES ENTERED BY CORPORATE AUTHORITIES OR JUDGES OF COUNTY COURTS AS TRUSTEES.

SEC. 2387. Whenever any portion of the public lands have been or may be settled upon and occupied as a town-site, not subject to entry under the agricultural pre-emption laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land-office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated.

SEC. 2388. The entry of the land provided for in the preceding section shall be made, or a declaratory statement of the purpose of the inhabitants to enter it as a town-site shall be filed with the register of the proper land-office, prior to the commencement of the public sale of the body of land in which it is included, and the entry or declaratory statement shall include only such land as is actually occupied by the town, and the title to which is in the United States; but in any Territory in which a land-office may not have been established, such declaratory statements may be filed with the surveyor-general of the surveying-district in which the lands are situated, who shall transmit the same to the General Land-Office.

SEC. 2389. If upon surveyed lands, the entry shall in its exterior limit be made in conformity to the legal subdivisions of the public lands authorized by law; and where the inhabitants are in number one hundred, and less than two hundred, shall embrace not exceeding three hundred and twenty acres; and in cases where the inhabitants of such town are more than two hundred, and less than one thousand, shall embrace not exceeding six hundred and forty acres;

and where the number of inhabitants is one thousand and over one thousand, shall embrace not exceeding twelve hundred and eighty acres; but for each additional one thousand inhabitants, not exceeding five thousand in all, a further grant of three hundred and twenty acres shall be allowed.

* * * * *

SEC. 2391. Any act of the trustees not made in conformity to the regulations alluded to in section twenty-three hundred and eighty-seven shall be void.

Act approved March 2, 1867 (14 Stat., 541). (See similar Act approved May 23, 1844, 5 Stat., 657, repealed by Act approved July 1, 1864, 13 Stat., 344, sec. 5.)

Acts approved June 23, 1874 (18 Stat., 254, sec. 3), and March 3, 1877 (19 Stat., 392).

SEC. 2392. No title shall be acquired, under the foregoing provisions of this chapter, to any mine of gold, silver, cinnabar, or copper; or to any valid mining-claim or possession held under existing laws.

Act approved March 2, 1867 (14 Stat., 542), and Act approved June 8, 1868 (15 Stat., 67). (See sec. 2386, Rev. Stats., *supra*, and sec. 16, Act of March 3, 1891, 26 Stat., 1101, *infra*.)

SEC. 2393. The provisions of this chapter shall not apply to military or other reservations heretofore made by the United States, nor to reservations for light-houses, custom-houses, mints, or such other public purposes as the interests of the United States may require, whether held under reservations through the Land-Office by title derived from the Crown of Spain, or otherwise.

Act approved March 2, 1867 (14 Stat., 542).

SEC. 2394. The inhabitants of any town located on the public lands may avail themselves, if the town authorities choose to do so, of the provisions of sections twenty-three hundred and eighty-seven, twenty-three hundred and eighty-eight, and twenty-three hundred and eighty-nine; and, in addition to the minimum price of the lands embracing any town site so entered, there shall be paid by the parties availing themselves of such provisions all costs of surveying and platting any such town site, and expenses incident thereto incurred by the United States, before any patent issues therefor; but nothing contained in the sections herein cited shall prevent the issuance of patents to persons who have made or may hereafter make entries, and elect to proceed under other laws relative to town-sites in this chapter set forth.

Act approved June 8, 1868 (15 Stat., 67).

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ADDITIONAL TOWNSITES, ETC.

* * * * *

That the existence or incorporation of any town upon the public lands of the United States shall not be held to exclude from pre-emption or homestead entry a greater quantity than twenty-five

hundred and sixty acres of land, or the maximum area which may be entered as a town-site under existing laws, unless the entire tract claimed or incorporated as such town-site shall, including and in excess of the area above specified, be actually settled upon, inhabited, improved, and used for business and municipal purposes.

SEC. 2. That where entries have been heretofore allowed upon lands afterwards ascertained to have been embraced in the corporate limits of any town, but which entries are or shall be shown, to the satisfaction of the Commissioner of the General Land Office, to include only vacant unoccupied lands of the United States, not settled upon or used for municipal purposes, nor devoted to any public use of such town, said entries, if regular in all respects, are hereby confirmed and may be carried into patent: *Provided*, That this confirmation shall not operate to restrict the entry of any town-site to a smaller area than the maximum quantity of land which, by reason of present population, it may be entitled to enter under said section twenty-three hundred and eighty-nine of the Revised Statutes.

SEC. 3. That whenever the corporate limits of any town upon the public domain are shown or alleged to include lands in excess of the maximum area specified in section one of this act, the Commissioner of the General Land Office may require the authorities of such town, and it shall be lawful for them, to elect what portion of said lands, in compact form and embracing the actual site of the municipal occupation and improvement, shall be withheld from pre-emption and homestead entry; and thereafter the residue of such lands shall be open to disposal under the homestead and pre-emption laws. And upon default of said town authorities to make such selection within sixty days after notification by the Commissioner, he may direct testimony respecting the actual location and extent of said improvements, to be taken by the register and receiver of the district in which such town may be situated; and, upon receipt of the same, he may determine and set off the proper site according to section one of this act, and declare the remaining lands open to settlement and entry under the homestead and pre-emption laws; and it shall be the duty of the secretary of each of the Territories of the United States to furnish the surveyor-general of the Territory for the use of the United States a copy duly certified of every act of the legislature of the Territory incorporating any city or town, the same to be forwarded by such secretary to the surveyor-general within one month from date of its approval.

SEC. 4. It shall be lawful for any town which has made, or may hereafter make entry of less than the maximum quantity of land named in section twenty-three hundred and eighty-nine of the Revised Statutes to make such additional entry, or entries, of contiguous tracts, which may be occupied for town purposes as when added to the entry or entries theretofore made will not exceed twenty-five hundred and sixty acres. *Provided*, That such additional entry shall not together with all prior entries be in excess of the area to which the town may be entitled at date of the additional entry by virtue of its population as prescribed in said section twenty-three hundred and eighty-nine.

Act approved March 3, 1877 (19 Stat., 392).

TOWNSITES ON MINERAL LANDS.

* * * * *

SEC. 16. That town-site entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be acquired by such towns or cities to any vein of gold, silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law. When mineral veins are possessed within the limits of an incorporated town or city, and such possession is recognized by local authority or by the laws of the United States, the title to town lots shall be subject to such recognized possession and the necessary use thereof and when entry has been made or patent issued for such town sites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein, and the surface ground appertaining thereto: *Provided*, That no entry shall be made by such mineral-vein claimant for surface ground where the owner or occupier of the surface ground shall have had possession of the same before the inception of the title of the mineral-vein applicant.

* * * * *

Act approved March 3, 1891 (26 Stat., 1101). (See secs. 2386 and 2392, Rev. Stats., *supra*.)

TOWNSITES ON CEDED INDIAN RESERVATIONS.

IN OKLAHOMA.

RESERVATIONS FOR PARKS, SCHOOLS, ETC., AND OKLAHOMA HOMESTEAD COMMUNITATIONS FOR TOWNSITES.

* * * * *

SEC. 22. That the provisions of Title thirty-two, chapter eight of the Revised Statutes of the United States relating to "reservation and sale of town sites on the public lands" shall apply to the lands open, or to be opened to settlement in the Territory of Oklahoma, except those opened to settlement by the proclamation of the President on the twenty-second day of April, eighteen hundred and eighty-nine: *Provided*, That hereafter all surveys for town sites in said Territory shall contain reservations for parks (of substantially equal area if more than one park) and for schools and other public purposes, embracing in the aggregate not less than ten nor more than twenty acres; and patents for such reservations, to be maintained for such purposes, shall be issued to the towns respectively when organized as municipalities: *Provided further*, That in case any lands in said Territory of Oklahoma, which may be occupied and filed upon as a homestead, under the provisions of law applicable to said Territory, by a person who is entitled to perfect his title thereto under such laws, are required for town-site purposes, it shall be lawful for such person to apply to the Secretary of the Interior to purchase the lands embraced in said homestead or any part thereof for town-site purposes. He shall file with the application a plat of such proposed town-site, and if such plat shall be approved by

the Secretary of the Interior, he shall issue a patent to such person for land embraced in said town site, upon the payment of the sum of ten dollars per acre for all the lands embraced in such town site, except the lands to be donated and maintained for public purposes as provided in this section. And the sums so received by the Secretary of the Interior shall be paid over to the proper authorities of the municipalities when organized, to be used by them for school purposes only.

* * * * *

Act approved May 2, 1890 (26 Stat., 91, sec. 22).

HOMESTEADS COMMUTED FOR TOWNSITE PURPOSES IN WICHITA, COMANCHE, KIOWA,
AND APACHE LANDS.

* * * * *

That that portion of section twenty-two of the Act approved May second, eighteen hundred and ninety, entitled "An Act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States court in the Indian Territory, and for other purposes," providing for the commutation for town-site purposes of homestead entries in certain instances, be, and the same is hereby, made applicable to the lands in the Territory of Oklahoma ceded to the United States by the Wichita and affiliated bands of Indians and the Comanche, Kiowa, and Apache tribes of Indians, under agreements, respectively, ratified by the Acts of Congress of March second, eighteen hundred and ninety-five, and June sixth, nineteen hundred.

Act approved March 11, 1902 (32 Stat., 63).

TOWNSITES VACATED IN COMMUTED HOMESTEADS.

* * * That in all cases where a town site, or an addition to a town site, entered under the provisions of section twenty-two of an Act entitled "An Act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States court in the Indian Territory, and for other purposes," approved May second, eighteen hundred and ninety, shall be vacated in accordance with the laws of the Territory of Oklahoma, and patents for the public reservations in such vacated town site, or addition thereto, have not been issued, it shall be lawful for the Commissioner of the General Land Office, upon an official showing that such town site, or addition thereto, has been vacated, and upon payment of the homestead price for such reservations, to issue a patent for such reservations to the original entryman.

If the original entryman shall fail or neglect to make application for the reservations within six months from the vacation of such town site, or from the passage of this Act, the reservations shall be subject to disposal under the provisions of section twenty-four hundred and fifty-five of the Revised Statutes of the United States, as amended by the Act approved February twenty-sixth, eighteen hundred and ninety-five.

Sec. 2. That if a patent has already issued, or shall hereafter issue, for any such reservation, to any town or municipality, such town or municipality, upon the vacation of the town site or addition

thereto, as aforesaid, may sell the same at public or private sale to the highest bidder after thirty days' public notice of such sale, and convey said lands to the purchaser by proper deed of conveyance, and cover the proceeds of such sale into the school fund of such town or municipality: *Provided*, That where, by reason of the vacation of an entire town site and all its additions, the municipal organization has ceased to exist, the reservations in such vacated town site which may have been patented to the town may be disposed of as isolated tracts under the provisions of section twenty-four hundred and fifty-five of the Revised Statutes of the United States, as amended by the Act approved February twenty-sixth, eighteen hundred and ninety-five.

SEC. 3. That all laws and parts of laws, in so far as they conflict with this Act, are hereby repealed.

Act approved May 11, 1896 (29 Stat., 116).

IN MINNESOTA.

TOWNSITES IN CEDED INDIAN LANDS.

* * * * *

That chapter eight, title thirty-two, of the Revised Statutes of the United States, entitled "Reservation and sale of town sites on the public lands," be, and is hereby, extended to and declared to be applicable to ceded Indian lands within the State of Minnesota. This act shall take effect and be in force from and after its passage.

Act approved February 9, 1903 (32 Stat., 820).

IN SOUTH DAKOTA.

TOWNSITES IN ROSEBUD INDIAN LANDS IN TRIPP COUNTY.

* * * * *

SEC. 2. That the land shall be disposed of by proclamation, under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation.

* * * * *

SEC. 4. That the Secretary of the Interior is authorized to reserve from said lands such tracts for town-site purposes as in his opinion may be required for the future public interests, and he may cause the same to be surveyed into blocks and lots and disposed of under such regulations as he may prescribe, in accordance with section twenty-three hundred and eighty-one of the United States Revised Statutes. The net proceeds derived from the sale of such lands shall be credited to the Indians as hereinafter provided. * * *

Approved March 2, 1907 (34 Stat., 1230 and 1231). See paragraph 9, proclamation of August 24, 1908 (37 L. D., 122).

IN NORTH AND SOUTH DAKOTA.

TOWNSITES IN CHEYENNE RIVER AND STANDING ROCK LANDS.

* * * * *

SEC. 2. That the lands shall be disposed of by proclamation under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which the lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation:

* * * * *

SEC. 5. That the Secretary of the Interior is authorized to reserve from said lands such tracts for town-site purposes as in his opinion may be required for the future public interests, and he may cause the same to be surveyed into blocks and lots and disposed of under such regulations as he may prescribe, in accordance with section twenty-three hundred and eighty-one of the United States Revised Statutes. The net proceeds derived from the sale of such lands shall be credited to the Indians as hereinafter provided.

* * * * *

Approved May 29, 1908 (35 Stat., 461 and 463).

IN UTAH.

TOWNSITES IN UINTAH LANDS.

* * * * *

That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the Act of Congress of May twenty-seventh, nineteen hundred and two, shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are thereby opened to settlement and entry. * * *

Act approved March 3, 1905 (33 Stat., 1069). See acts approved May 27, 1902 (32 Stat., 263), March 3, 1903 (32 Stat., 998), and April 21, 1904 (33 Stat., 207). Also see proclamations of July 14, 31, and August 14, 1905 (34 Stat., 3122, 3139, and 3143).

IN NEVADA.

TOWNSITES IN WALKER RIVER LANDS.

* * * * *

And when such allotments shall have been made, and the consent of the Indians obtained as aforesaid, the President shall, by proclamation, open the land so relinquished to settlement, to be disposed of under existing laws.

* * * * *

Act approved May 27, 1902 (32 Stat., 261). See proclamation of September 26, 1906 (34 Stat., 3237).

IN WYOMING.

TOWNSITES IN SHOSHONE OR WIND RIVER LANDS.

* * * * *

SEC. 2. That the lands ceded to the United States under the said agreement shall be disposed of under the provisions of the homestead, town-site, coal and mineral land laws of the United States and shall be opened to settlement and entry by proclamation of the President of the United States on June fifteenth, nineteen hundred and six, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, and enter said lands except as prescribed in said proclamation until after the expiration of sixty days from the time when the same are opened to settlement and entry, * * *.

Lands entered under the town-site, coal, and mineral-land laws shall be paid for in amount and manner as provided by said laws.

* * * * *

Act approved March 3, 1905 (33 Stat., 1021). See proclamation of June 2, 1906 (34 Stat., 3212).

IN MONTANA.

TOWNSITES IN CROW LANDS.

* * * * *

SEC. 5. * * * That the lands not withdrawn for irrigation under said reservation Act, which lands shall be determined under the direction of the Secretary of the Interior at the earliest practical date, shall be disposed of under the homestead, town-site, and mineral-land laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy,

or enter any of said lands, except as prescribed in such proclamation, until after the expiration of sixty days from the time when the same are opened to settlement and entry: * * *

That the price of said lands shall be four dollars per acre, when entered under the homestead laws, * * *.

Lands entered under the town-site and mineral-land laws shall be paid for in amount and manner as provided by said laws, but in no event at a less price than that fixed herein for such lands, if entered under the homestead laws, * * *.

Act approved April 27, 1904 (33 Stat., 360 and 361). See proclamation of May 24, 1906 (34 Stat., 3204).

TOWNSITES IN FLATHEAD LANDS.

* * * * *

SEC. 17. That the Secretary of the Interior is hereby authorized and directed to reserve and set aside for townsite purposes, and to survey, lay out, and plat into town lots, streets, alleys, and parks not less than forty acres of said land at or near each of the present settlements of Arlee, Dayton, Ravalli, Dixon, and Ronan, and not less than eighty acres at the present settlements of Saint Ignatius and Polson, and at such other places as the Secretary of the Interior may deem necessary or convenient for town sites, in such manner as will best subserve the present needs and the reasonable prospective growth of said settlements.

Such town sites shall be surveyed, appraised, and disposed of as provided in section twenty-three hundred and eighty-one of the United States Revised Statutes: *Provided*, That any person who, at the date when the appraisers commence their work upon the land, shall be an actual resident upon any one such lot and the owner of substantial and permanent improvements thereon, and who shall maintain his or her residence and improvements on such lot to the date of his or her application to enter, shall be entitled to enter, at any time prior to the day fixed for the public sale and at the appraised value thereof, such lot and any one additional lot of which he or she may also be in possession and upon which he or she may have substantial and permanent improvements: *Provided further*, That before making entry of any such lot or lots the applicant shall make proof, to the satisfaction of the register and receiver of the land district in which the land lies, of such residence, possession, and ownership of improvements, under such regulations as to time, notice, manner, and character of proof as may be prescribed by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior: *Provided further*, That in making their appraisal of the lots so surveyed, it shall be the duty of the appraisers to ascertain the names of the residents upon and occupants of any such lots, the character and extent of the improvements thereon, and the name of the reputed owner thereof, and to report their findings in connection with their report of appraisal, which report of findings shall be taken as prima facie evidence of the facts therein set out. All such lots not so entered prior to the day fixed for the public sale shall be offered at public outcry in their regular order, with the other unimproved and unoccupied lots. That no lot shall

be sold for less than ten dollars: *And provided further*, That said lots, when surveyed, shall approximate fifty by one hundred and fifty feet in size.

Act of June 21, 1906 (34 Stat., 354, amending Acts April 23, 1904, 33 Stat., 302, and March 3, 1905, 33 Stat., 1048).

TOWNSITES IN BLACKFEET AND FORT PECK LANDS.

The paragraph relating to "Town sites" in the Act approved March 1, 1907 (34 Stat., 1039), relative to the townsites of Browning and Babb and such other townsites as may be reserved in the Blackfoot Indian Reservation, and section 14 of the Act approved May 30, 1908 (35 Stat., 563), relative to the townsite of Poplar and such other townsites as may be reserved in the "Fort Peck Indian Reservation," are in substance the same as section 17 in the Flathead Act above quoted, except that the Act concerning townsites in the Fort Peck Reservation grants a preference right of entry to five instead of two lots.

IN WASHINGTON.

TOWNSITES IN COLVILLE LANDS.

* * * * *

SEC. 11. That nothing contained in this Act shall prohibit the Secretary of the Interior from reserving from said lands, whether surveyed or unsurveyed, such tracts for town-site purposes, as in his opinion may be required for the future public interests, and he may cause any such reservation, or parts thereof, to be surveyed into blocks and lots of suitable size, and to be appraised and disposed of under such regulations as he may prescribe, and the net proceeds derived from the sale of such lands shall be paid to said Indians, as provided in section six of this Act:

* * * * *

Approved March 22, 1906 (34 Stat., 82).

TOWNSITES IN SPOKANE LANDS.

* * * * *

SEC. 4. That the Secretary of the Interior * * * is further authorized and directed to reserve and set aside such tracts as he may deem necessary or convenient for town-site purposes, and he may cause any such reservations to be surveyed into lots and blocks of suitable size and to be appraised and disposed of under such regulations as he may prescribe, and the net proceeds derived from the sale of such lands shall be deposited in the Treasury of the United States to the credit of the Indians of the Spokane Reservation.

* * * * *

Act approved May 29, 1908 (35 Stat., 459).

IN IDAHO.

TOWNSITES IN COEUR D'ALENE LANDS.

* * * * *

That the Secretary of the Interior shall reserve from said lands, whether surveyed or unsurveyed, such tracts for town-site purposes as in his opinion may be required for the future public interests, and he may cause any such reservations, or parts thereof, to be surveyed into blocks and lots of suitable size, and to be appraised and disposed of under such regulations as he may prescribe, and the net proceeds derived from the sale of such lands shall be paid to said Indians as provided in section seven of this Act:

* * * * *

Act approved June 21, 1906 (34 Stat., 337).

IN CALIFORNIA AND ARIZONA.

TOWNSITES IN YUMA AND COLORADO RIVER LANDS.

* * * * *

There is also appropriated out of any money in the Treasury not otherwise appropriated, the further sum of five thousand dollars, or so much thereof as may be necessary, to enable the Secretary of the Interior to reserve and set apart lands for town-site purposes in the Yuma Indian Reservation, California, and the Colorado River Indian Reservation in California and Arizona, and to survey, plat, and sell the tracts so set apart in such manner as he may prescribe, the net proceeds to be deposited in the Treasury of the United States to the credit of the Indians of the reservations, respectively, to be reimbursed out of the funds arising from the sale of the lands.

* * * * *

Act approved April 30, 1908 (35 Stat., 77).

TOWNSITES IN RECLAMATION PROJECTS.

* * * That the Secretary of the Interior may withdraw from public entry any lands needed for town-site purposes in connection with irrigation projects under the reclamation Act of June seventeenth, nineteen hundred and two, not exceeding one hundred and sixty acres in each case, and survey and subdivide the same into town lots, with appropriate reservations for public purposes.

SEC. 2. That the lots so surveyed shall be appraised under the direction of the Secretary of the Interior and sold under his direction at not less than their appraised value at public auction to the highest bidders, from time to time, for cash, and the lots offered for sale and not disposed of may afterwards be sold at not less than the appraised value under such regulations as the Secretary of the Interior may prescribe. Reclamation funds may be used to defray the neces-

sary expenses of appraisement and sale, and the proceeds of such sales shall be covered into the reclamation fund.

SEC. 3. That the public reservations in such town sites shall be improved and maintained by the town authorities at the expense of the town; and upon the organization thereof as municipal corporations the said reservations shall be conveyed to such corporations by the Secretary of the Interior, subject to the condition that they shall be used forever for public purposes.

SEC. 4. That the Secretary of the Interior shall, in accordance with the provisions of the reclamation Act, provide for water rights in amount he may deem necessary for the towns established as herein provided, and may enter into contract with the proper authorities of such towns, and other towns or cities on or in the immediate vicinity of irrigation projects, which shall have a water right from the same source as that of said project for the delivery of such water supply to some convenient point, and for the payment into the reclamation fund of charges for the same to be paid by such towns or cities, which charges shall not be less nor upon terms more favorable than those fixed by the Secretary of the Interior for the irrigation project from which the water is taken.

SEC. 5. That whenever a development of power is necessary for the irrigation of lands under any project undertaken under the said reclamation Act, or an opportunity is afforded for the development of power under any such project, the Secretary of the Interior is authorized to lease for a period not exceeding ten years, giving preference to municipal purposes, any surplus power or power privilege, and the moneys derived from such leases shall be covered into the reclamation fund and be placed to the credit of the project from which such power is derived: *Provided*, That no lease shall be made of such surplus power or power privilege as will impair the efficiency of the irrigation project.

Act approved April 16, 1906 (34 Stat., 116).

AMENDMENT TO ABOVE ACT.

* * * * *

SEC. 4. * * * Whenever, in the opinion of the Secretary of the Interior, it shall be advisable for the public interest, he may withdraw and dispose of townsites in excess of one hundred and sixty acres under the provisions of the aforesaid Act, approved April sixteenth, nineteen hundred and six, and reclamation funds shall be available for the payment of all expenses incurred in executing the provisions of this Act, and the aforesaid Act of April sixteenth, nineteen hundred and six, and the proceeds of all sales of town-sites shall be covered into the reclamation fund.

* * * * *

Act approved June 27, 1906 (34 Stat., 520).

ALIENS MAY ACQUIRE TOWN LOTS IN THE TERRITORIES.

* * * * *

SEC. 2. * * * This Act shall not be construed to prevent any persons not citizens of the United States from acquiring or holding lots or parcels of lands in any incorporated or platted city, town, or village, * * * in any of the Territories of the United States.

* * * * *

Act approved March 2, 1897 (29 Stat., 618).

PARKS AND CEMETERIES.

That incorporated cities and towns shall have the right, under rules and regulations prescribed by the Secretary of the Interior, to purchase for cemetery and park purposes not exceeding one-quarter section of public lands not reserved for public use, such lands to be within three miles of such cities or towns: *Provided*, That when such city or town is situated within a mining district, the land proposed to be taken under this Act shall be considered as mineral lands, and patent to such land shall not authorize such city or town to extract mineral therefrom, but all such mineral shall be reserved to the United States, and such reservation shall be entered in such patent.

Act approved September 30, 1890 (26 Stat., 502).

CEMETERIES.

That the Secretary of the Interior be, and he is hereby, authorized to sell and convey to any religious or fraternal association, or private corporation, empowered by the laws under which such corporation or association is organized or incorporated to hold real estate for cemetery purposes, not to exceed eighty acres of any unappropriated non-mineral public lands of the United States for cemetery purposes, upon the payment therefor by such corporation or association of the sum of not less than one dollar and twenty-five cents per acre: *Provided*, That title to any land disposed of under the provisions of this Act shall revert to the United States, should the land or any part thereof be sold or cease to be used for the purpose herein provided.

Act approved March 1, 1907 (34 Stat., 1052).

TOWNSITE-REGULATIONS.

COUNTY-SEAT TOWNSITES.

Under section 2286, U. S. Rev. Stats., 160 acres of public land may be entered, at the minimum price therefor, by a county or parish, for the establishment therein of a seat of justice, the proceeds of the sale of a tract so entered to be devoted to the erection of public buildings in the county or parish making the entry.

The application should cite said section of the statute and describe the land applied for by legal subdivisions, and be signed by an officer of the county or parish authorized to do so by an order of the county or parish board, and such application should be filed in the proper local land office, together with the notice of intention to make proof in the form prescribed by Act approved March 3, 1879 (20 Stat., 472).

Proof and payment.—The land must be paid for at the government price per acre after proof has been furnished satisfactorily showing—

First. Six weeks' publication and posting of notice of making proof as in homestead and other cases.

Second. The official character of the officer filing the application and the properly certified record proof of his authority therefor.

Third. The due establishment, under the laws of the State or Territory, of the seat of justice for the county upon the land applied for, and also a reference to the law creating such county.

Fourth. That the land applied for is unappropriated public land.

The corporate name of the county must be inserted in the granting clause of the certificate of entry.

TOWNSITES RESERVED BY PRESIDENT.

Under section 2380, U. S. Rev. Stats., public land may be reserved by the President for townsite purposes on his own motion, or petitions may be addressed to him therefor, setting forth facts warranting his action under said section, duly verified by the affidavit of one or more persons, such petitions to be filed with the President, the Department, or this office, or with the local officers for transmission to this office.

Survey and appraisal.—Townsites reserved under section 2380, or under any other law directing their disposition under section 2381, will be surveyed, when ordered by the Department, under the supervision of this office, into urban, or urban and suburban, lots and blocks, and thereafter the lots and blocks will be appraised by such

disinterested person or persons as may be appointed by the Secretary of the Interior. Each appraiser must take his oath of office and transmit the same to this office before proceeding with his work. This office must be notified by wire of the time when such appraiser or appraisers enter on duty. They will examine each lot to be appraised and determine the fair and just cash value thereof. Improvements on such lots, if any, must not be considered in fixing such value. Lots or blocks reserved for public purposes will not be appraised.

The schedule of appraisal must be prepared in duplicate on forms furnished by this office, and the certificates at the end thereof must be signed by each appraiser, and on being so completed they must be immediately transmitted to this office, and when approved by the Secretary of the Interior one copy will be sent to the local officers.

Notices of sale will be published for thirty days (unless a shorter time be fixed in a special case) by advertisement in such newspapers as the Department may select and by posting a copy of the notice in a conspicuous place in the register's office.

How sold.—Beginning on the day fixed in the notice and continuing thereafter from day to day (Sundays and legal holidays excepted) as long as may be necessary, each appraised lot will be offered for sale at public outcry to the highest bidder for cash, at not less than its appraised value.

Qualifications and restrictions.—No restriction is made as to the number of lots one person may purchase. Bids and payments may be made through agents, but not by mail or at any time or place other than that fixed in the notice of sale.

Combinations in restraint of the sale are forbidden by section 2373 of the Revised Statutes of the United States, which reads as follows:

Every person who, before or at the time of the public sale of any of the lands of the United States, bargains, contracts, or agrees, or attempts to bargain, contract, or agree with any other person, that the last-named person shall not bid upon or purchase the land so offered for sale, or any parcel thereof, or who by intimidation, combination, or unfair management, hinders or prevents, or attempts to hinder or prevent any person from bidding upon or purchasing any tract of land so offered for sale, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both.

Suspension or postponement of the sale may be made for the time being, to a further day, or indefinitely, in case of any combination which effectually suppresses competition or prevents the sale of any lot at its reasonable value, or in case of any disturbance which interrupts the orderly progress of the sale.

Payments and forfeitures.—If any bidder to whom a lot has been awarded fails to make the required payment therefor to the receiver, before the close of the office on the day the bid was accepted, the right thereafter to make such payment will be deemed forfeited, and the lot will be again offered for sale on the following day, or if the sale has been closed, then such lot will be considered as offered and unsold, and all bids thereafter by the defaulting bidder may, in the discretion of the local officers, be rejected.

Lots offered and unsold.—Each lot offered and remaining unsold at the close of the sale will thereafter be and remain subject to private sale and entry, for cash, at the appraised value of such lot.

Certificates.—All lots purchased at the same time, in the same manner, in the same townsite; and by the same person should be included in one certificate, in order to prevent unnecessary multiplicity of patents. Lots sold at private sale should be accompanied by an application therefor, signed by the applicant. Certificates will be issued upon payment of the purchase price, as in other cases.

TOWNSITES PLATTED BY OCCUPANTS.

Title to lots and blocks in an established town on public land may be acquired under sections 2382 to 2386, inclusive, U. S. Rev. Stats.

Survey and plat.—The occupants, at their own expense, must cause a survey of the land into lots, blocks, streets and alleys to be made, and the plat and field notes thereof to be filed with the recorder of the county in which the land is situated. The plat must show (1) that the land does not include an area in excess of 640 acres, unless the lots, buildings, and improvements cover a greater area, and then only to the extent so occupied and improved; (2) that the boundaries of the land are correctly shown and described thereon according to the lines of the public surveys, or if not so surveyed, then that the exterior lines of the townsite survey are tied to a designated, permanent, and thoroughly identified monument; (3) that the streets, squares, blocks, lots, and alleys, the dimensions of the same, with measurements, courses, and area of each municipal subdivision, and the name of the town are correctly delineated thereon; and (4) the exterior lines of all existing railroad rights of way and station grounds. The lots should not exceed 4,200 square feet, except in cases where the configuration necessitates a different area. The above required facts should be verified by the oath of the surveyor entered upon the margin of the plat.

A *statement* of the extent and general character of the improvements on the land must be filed with the plat and field notes, and such plat and statement must be verified by the oath of the party acting for and in behalf of the occupants of the land.

Transcript of plat and statement.—Within one month after filing such plat, field notes, and statement, a transcript thereof in duplicate, each duly verified by the certificate of the county recorder, and accompanied by the testimony of two witnesses that such town has been established in good faith, and showing the number of inhabitants thereof, and when it was so established, shall be filed with the register and receiver of the land office in which the townsite is located, who will immediately transmit the same to this office for consideration, and upon the approval thereof one of said duplicate plats and statements will be returned to the local officers for their files.

Notice of filing plat.—On filing such plat and statement the register and receiver will prepare and conspicuously post in their office a notice to the effect that the official plat of such town site has been filed in their office, and that they are ready to receive applications by lot occupants to make proof for and purchase the lots occupied by them, respectively. The newspapers in the vicinity should be given copies of the notice as an item of news, and such other publicity should be given it as can be done without expense.

Adjustment to lines of public survey.—When the townsite is upon land over which the township surveys have not been extended, the surveyor-general will be notified of the townsite survey and be furnished by this office with an outline plat showing the exterior lines thereof, with courses and distances, the date of the survey and the approval thereof, and thereafter when the township surveys have been extended over the land the exterior lines of the townsite may be adjusted thereto where it can be done without impairing vested rights.

Department may make townsite survey.—Refusal or failure to file such transcript, plat, field notes, and statement, with the testimony, as above required, within twelve months from the establishment of a town on the public domain, will authorize the Secretary of the Interior to cause a survey and plat to be made thereof, the lots in which shall be disposed of at an increase of fifty per centum on the minimum price.

The minimum price for all lots of 4,200 square feet or less is \$10 per lot, except in cases where the Secretary of the Interior causes the survey into lots and blocks to be made by the Government, in which case the minimum price is \$15 per lot for such lots. The minimum price for all lots in excess of 4,200 square feet will be computed by adding to said minimum price of \$10 or \$15, as the case may be, the sum of \$4 for each additional 1,000 square feet or fractional part thereof in excess of 4,200 square feet.

A preemption right of purchase at the minimum price, at any time before the day fixed for the public sale, of not exceeding two lots, is accorded an actual resident, to secure which he must file in the local office his application therefor, and therein state the date of settlement, the value and character of his improvements thereon, that he is 21 years of age or over or the head of a family, and that he is a citizen of the United States or has declared his intention to become such. The notice of intention to make proof must be filed and the notice for publication must be issued, published, and posted at the applicant's expense as in ordinary cases and in manner and form and for the time as provided in the act of March 3, 1879 (20 Stat., 472).

Preemption proof may be made before the register and receiver, or any officer duly authorized by law, and must show by record or documentary evidence where such evidence is usually required, and where not so required by the testimony of witnesses, (1) due publication of the register's notice; (2) the claimant's age; (3) his citizenship; and (4) his actual residence upon one lot and substantial improvements on the second lot, if two lots be included in the application. The proof must embrace the testimony of the applicant and of at least two of his advertised witnesses. The purchase price for the lot or lots must be paid to the receiver when the proof is made. Entry of public lands under other laws, or in other townsites, or ownership of more than 320 acres, will not disqualify an applicant from making such entry. No entry can be made of an improved lot on which the claimant does not reside unless his residence lot is included in the same or a previous entry.

Hearings will be ordered and conducted in accordance with the Rules of Practice where two or more adverse applications are filed for the same lot, or where a sufficient contest affidavit is filed against an application, on or before the day fixed for making proof, but no purchase money will be collected from the applicants until the final determination of the case, whereupon the successful applicant will be

required to pay the purchase price within thirty days from notice thereof.

Mineral surveys, locations, applications, and entries covering lots in such townsites will not prevent the entry of such lots hereunder and the issuance of patent thereon, but such mineral claims, if held under prior and valid mineral rights, are amply protected by the law from prejudice by the allowance of such town-lot entries and patents, and paramount patents may be issued thereafter to such mineral claimants.

Mineral patents.—Lots *wholly* covered by outstanding mineral patents are not subject to entry under the townsite law, and applications therefor will be rejected. Lots *partly* covered by mineral patents may be entered at the price fixed for the whole lot, but the certificate and receipt must contain at the end of the description an exception clause as follows: "Excepting and excluding the portion of said lot (or lots) embraced in mineral patent (or patents) heretofore issued."

Millsites.—The continued use and occupation within a townsite of a duly located millsite claim under section 2337, U. S. Rev. Stats., from a time prior to a settlement and occupation thereon for townsite purposes, will defeat the rights of the claimant under the townsite laws to any part of the land within such millsite.

Railroad rights of way and station grounds, when approved by the department, are subject to all valid rights existing at the date of filing the application for such rights of way or station grounds.

Forfeiture of preemption right.—All right to preempt and purchase occupied and improved lots for which no entry has been allowed prior to or on the date fixed for the public sale will be forfeited unless a contest be pending thereon as hereinbefore provided, and such lots will be offered for sale together with the unoccupied lots. When notified of the date fixed for the public sale, the register and receiver will refuse to receive or consider any such application for entry where due publication could not be had and proof made thereon prior to the date so fixed for the public sale.

Public sale.—The notice of public sale will be prepared and published in the form and manner herein provided for the sale of town lots under section 2381, U. S. Rev. Stats., and the sale will be conducted in the same manner and subject to the same restrictions, except that no lot shall be sold for less than the minimum price herein fixed therefor, and such lots as may not be so disposed of shall thereafter be liable to private entry at such minimum, or at such reasonable increase or diminution as the Secretary of the Interior may order from time to time after at least three months' notice. Certificates and applications for private entry must be issued and filed in manner and form as provided in the regulations under said section 2381.

TOWNSITES ENTERED BY CORPORATE AUTHORITIES OR JUDGES OF COUNTY COURTS AS TRUSTEES.

Segregation by townsite settlement.—Public lands settled upon and occupied as a townsite are thereby segregated from entry under the agricultural land laws, and may be entered under sections 2387 to 2389, subject to the restrictions contained in sections 2386 and 2391 to 2393, inclusive, U. S. Rev. Stats.

Entries, by whom made.—If the town is incorporated the entry must be made by the corporate authorities or by the mayor or other principal officer authorized so to do by resolution or ordinance of the town board or city council. If the town is not incorporated, the entry must be made by the judge of the county court upon petition addressed to him therefor, signed by such number of actual occupants of lots therein as may be required by the laws of the State or Territory in which the town is situated. Private individuals, organizations, or corporations are not authorized to make such entries.

A double trust.—The entry must be made in trust (1), as to the occupied lots, for the several use and benefit of the occupants thereof according to their respective interests, and (2) as to the unoccupied lots, for the use and benefit of the municipality, the public, or the occupants collectively as a community. Such entries can not be made for the benefit of one individual, or organization, or corporation, but only for the benefit of the actual inhabitants and occupants of an established town. Prospective townsites can not be so entered.

The execution of the trust as to the disposal of the lots and the proceeds of sales is to be conducted under regulations prescribed by the state or territorial laws. Acts of trustees not in accordance with such regulations are void.

The amount of land that may be entered under this act is proportionate to the number of inhabitants. One hundred and less than two hundred inhabitants may enter not to exceed 320 acres; two hundred and less than one thousand inhabitants may enter not to exceed 640 acres; and where the inhabitants number one thousand and over an amount not to exceed 1,280 acres may be entered; and for each additional one thousand inhabitants, not to exceed five thousand in all, a further amount of 320 acres may be allowed. When the number of inhabitants of a town is less than one hundred the townsite shall be restricted to the land actually occupied for town purposes, by legal subdivisions.

Unsurveyed public land upon which a town has been established may be entered hereunder. In such case a special survey should be procured by application to the surveyor-general therefor, the cost of which survey will be paid out of the general appropriations for public surveys. When the plat of such survey is filed in the local office, application may be made to enter the land described therein.

Declaratory statements may be filed as the initiatory step for the entry of the land in all cases where the occupants are not ready to apply for entry, and should be so filed in order to protect their rights. The statement should be signed and filed by the officer entitled to make entry under the law, and should show the number of inhabitants, that the land is occupied for trade, business, and other townsite purposes, and the date when first so occupied, and declare the purpose of the occupants to enter it under the townsite laws. It should include only such lands as the town is entitled to enter by government subdivisions where surveyed, and if not surveyed the land should be described so it may be easily identified.

Proof.—The notice of intention to make proof must be filed and the notice for publication must be issued, published, and posted at the applicant's expense as in ordinary cases, and in manner and form and for the time provided in the act of March 3, 1879 (20 Stat., 472). The proof may be made before the register and receiver or any

officer duly authorized by law, and must show, by record or documentary evidence, where such evidence is usually required, and where not so required, by the testimony of at least two of the advertised witnesses, (1) due publication of the register's notice; (2) if an incorporated town, proof of incorporation, which should be a certified copy of the order of incorporation, or if by legislative enactment, a citation to such act; (3) certified record evidence of the election, qualification, and the authority of the officer making entry; (4) the number of townsite occupants and claimants on each occupied government subdivision; (5) the number of inhabitants in the townsite; (6) the character, extent, and value of townsite improvements located on each government subdivision; and (7) the date when the land was first used for townsite purposes.

Restrictions.—First. Area.—Entry can not be made hereunder of a greater quantity of land than 2,560 acres, unless the excess in area is actually settled upon, inhabited, improved, and used for business and municipal purposes.

Second. Unpatented mineral claims.—Under said sections 2386, 2392, and section 16 of the act of March 3, 1891 (26 Stat., 1101), the title to lands acquired hereunder will be subject to all valid prior rights to *unpatented* mining claims or possessions held under existing law, and paramount patents may be issued thereafter to such mineral claimants, notwithstanding the prior townsite patent.

Third. Patented mineral claims.—All lands covered by patented mineral claims must be omitted from townsite entries hereunder. Government subdivisions of land, made fractional by the omission of such patented claims, will be designated by lot numbers on a segregation diagram prepared by the surveyor-general.

Fourth. Reservations for the use of the United States Government are not subject to entry hereunder.

Fifth. Millsites.—The continued use and occupation within a townsite of a duly located millsite claim under section 2337, U. S. Rev. Stats., from a time prior to a settlement and occupation thereof for townsite purposes, will defeat the rights of the claimant under the townsite laws to any part of the land within such millsite.

Sixth. Railroad rights of way and station grounds, when approved by the Department, are subject to all valid rights existing at the date of filing the application for such rights of way or station grounds.

Change of method of entry.—Where proceedings have been had for the entry of lots under sections 2382 to 2386, inclusive, U. S. Rev. Stats., but no patent has issued thereunder, the occupants may avail themselves, if the town authorities choose to do so, of the provisions of said sections 2387 to 2389 and make proof and entry thereunder: Provided, however, that in addition to the minimum price for the land applied for there shall be paid, before patent issues therefor, by the parties applying for such change of entry, all costs of surveying and platting such townsite and expenses incident thereto incurred by the Government under the provisions of said sections 2382 to 2386. On application to this office the applicants will be informed of the amount of said expense to be paid in excess of the purchase price of the land in order to effectuate such change of entry.

Additional entries.—Where townsite entry has been or may hereafter be made, under the provisions of said sections 2387 to 2393,

additional entries may be made, under the provisions of section 4 of the act approved March 3, 1877 (19 Stat., 392), of such contiguous tracts as may be occupied for townsite purposes, but such additional entry shall not, together with all prior entries made for such townsite, be in excess of the area to which the town may be entitled at date of the additional entry by virtue of its population as prescribed in said section 2389: Provided, however, that such area shall not exceed 2,560 acres. Such additional entries will be made in the same manner and under the same regulations as are herein provided for entries under said sections 2387 to 2393, inclusive.

Entry and payment.—When townsite proof has been submitted hereunder the register and receiver will, if they approve the same, forward it to this office with their recommendation thereon, without collecting the purchase money and without issuing the final papers. If the proof submitted to this office is found satisfactory the local officers will be notified thereof, and if no objections exist in their office they will notify the applicant thereof, and on payment of the minimum price fixed by the law for the purchase of the land they will issue the final papers. (See Circular of January 6, 1904, 32 L. D., 481.)

TOWNSITES ON MINERAL LANDS.

In view of the numerous inquiries touching the rights of claimants for mineral lands situated within townsites, as opposed to rights which may be acquired to such lands under the townsite laws, it is deemed appropriate to herein recite the principal rules applicable to the subject, so far as they seem clear from the law itself or are indicated by the trend of adjudicated cases.

The general townsite laws, comprised in secs. 2380 to 2394, U. S. Rev. Stats., authorize the entry of townsites, or the sale of lots therein, upon public lands which may include unpatented mineral claims, but the rights of mineral claimants upon any land entered or sold under said townsite laws are expressly protected by secs. 2386 and 2392. These two sections recognize the superior rights, as against any townsite claimant—whether corporate, community, or individual—of all claimants for mineral veins possessed agreeably to local custom, or for any valid mining claim or possession held under existing law. The precedence and superiority so accorded to mineral claims, however, depend in final analysis upon the question of fact whether, at date of townsite entry or lot sale, the lands claimed under the mining laws were “known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them” (31 L. D., 87). Where an affirmative showing in such behalf is made in due course by the mineral claimant, his right to a patent for the land (subject to the distinction hereinafter noted as to incorporated towns) will not be prejudiced by any previous townsite entry, deed, or patent covering the same land (26 L. D., 144; 29 L. D., 426; 32 L. D., 211; 34 L. D., 276 and 596).

Under said general townsite laws, as construed by the Department and the courts, an entry including unpatented mineral lands may be made for an incorporated town as well as for an unincorporated town, the law requiring that in the former case the entry shall be

made by the corporate authorities, and in the latter by the county judge (34 L. D., 24). While such general right of entry by or for incorporated towns and cities is therefore independent of anything contained in sec. 16 of the act of March 3, 1891 (26 Stats., 1095), it will be seen that that section in terms announces the right to enter mineral lands. The protection afforded to mineral claims by the body of sec. 16 is similar to that given generally in said secs. 2386 and 2392, Rev. Stats., but the proviso to sec. 16 is as follows:

Provided, That no entry shall be made by such mineral-vein claimant for surface ground where the owner or occupier of the surface ground shall have had possession of the same before the inception of the title of the mineral-vein applicant.

This Department has never viewed said proviso as warranting, under any circumstances, the allowance of entry for a mineral vein independently of "the surface ground appertaining thereto," nor is such an entry provided for in the general mining laws. But said proviso creates one distinction between unincorporated and incorporated towns as regards the relative rights of townsite occupants and mineral claimants, which is, that whereas the townsite patent will, in either case, carry absolute title to any mineral not known to exist at the date of townsite entry, the adverse rights of mineral and town-lot claimants within incorporated towns are hinged upon priority of initiation. That is to say, that after entry is made for such town, no entry by a mineral-vein applicant will be allowed for any land owned and occupied under the townsite law by a party whose possession antedated the inception of the mineral applicant's claim, even though such land was known, at date of the townsite entry, to contain valuable minerals.

Subject to the distinction above noted, the foregoing principles apply to all mineral claims within townsites entered or disposed of under any of the laws above mentioned, and also to mineral claims within townsites disposable under special acts containing no reference to the rights of mining claimants.

The law does not require that townsite entries shall exclude any mineral claim or possession except such as may have been patented (29 L. D., 21). Mineral claims which have not been patented may be excluded from a townsite entry at the option of the townsite applicant, who must, in that event, furnish satisfactory proof that the exclusion covers a "valid mining claim or possession held under existing law" (33 L. D., 542). The exclusion of a millsite claim from a townsite entry is necessary only in cases where the millsite claimant shall have been in occupation of the ground, under regular location, from a time antedating its occupation for townsite purposes. The issue of priority in such cases may be raised by the townsite applicant, the millsite claimant, or the Government.

TOWNSITES ON CEDED INDIAN RESERVATIONS.

IN OKLAHOMA.

How entered.—Under section 22 of the act approved May 2, 1890 (26 Stat., 91), townsite entries may be made in the same manner, under the same regulations, and for the same purchase price herein provided for entries under sections 2380 and 2381, 2382 to 2386, or

2387 to 2394, U. S. Rev. Stats., except that the following additional proof is required:

Public reserves.—Triplicate plats of the survey of the townsite into lots and blocks must be made and filed with the local officers at the time of submitting proof, showing the reservation of not less than ten nor more than twenty acres for park, school, and other public purposes. Such plats shall be made on tracing linen and on a scale of 100 feet to 1 inch, and be provided with a margin sufficient to contain the verifications of the surveyor and the applicant acting for the town and the approval thereof by the proper officer of the Land Department. The name of the townsite must be stated on the plats, and they must contain a description of the land and the exterior boundaries thereof, according to the lines of the public surveys, and must exhibit the streets, squares, blocks, lots, and alleys, the courses and distances of the exterior lines of the squares, the width and courses of the streets and alleys, the size of the regular lots and blocks, and if a lot or block is irregular in shape the dimensions and courses of the lines of each should be indicated, so the area thereof may be readily computed, and the area of each reserve and the particular public purpose for which the reserve is made must be designated thereon. The exterior lines of all existing railroad rights of way and station grounds should also be delineated on the plat. Whenever an entry is made adjacent to a town already in existence, the streets must conform to the streets already established, and this must be stated in the affidavit of the surveyor upon the margin of each plat, which affidavit must also contain a statement showing the correctness of the survey and plats of the land, describing it, and giving the aggregate area of the tracts reserved for public purposes. The affidavit of the applicant upon the margin of each plat shall contain the statement that the application for the described tract of land as the townsite of — is made under the provisions of section 22 of the act of May 2, 1890 (26 Stat., 91); that all streets, alleys, parks, and reservations are dedicated to public use and benefit; and that the plat is correct according to the survey made by the proper surveyor. Upon the receipt of such proof and plat by this office, if found to be satisfactory, the plats will be approved by the commissioner, and two of them will be returned to the local officers, one to be retained in their files and one to be given to the applicant for filing with the recorder of the proper county, and the local officers will be directed to take such further action as may be prescribed by the law and regulations under which the application is made.

Homestead commutations for townsites.—Applications to commute homestead entries, or portions thereof, for townsite purposes under the provisions of the second proviso of section 22 of the act approved May 2, 1890 (26 Stat., 91), will be addressed to the Secretary of the Interior and be filed in the district land office. The application may be on Form 4-001, and may be made for the commutation of the whole or a part of the homestead entry, but must be by full legal subdivisions, and any application for less than a full legal subdivision or for land involved in any contest will not be recognized.

Proof.—Notice of intention to make proof and the notice for publication shall be the same in all respects as that required of a claimant in making final homestead proof, with the addition that it shall state that said proof will be made under section 22 of the act

of May 2, 1890. Proof by the claimant and two of his advertised witnesses must be furnished showing—

First. Due publication of notice as in ordinary cases.

Second. That the land is required for townsite purposes.

Third. Due compliance by the entryman with the provisions of the law and of the President's proclamation under which settlement on the land became permissible.

Fourth. The claimant's citizenship and qualifications in all other respects as a homesteader, the same as in making final homestead or commutation proof.

Fifth. Due compliance by the claimant with all the requirements of the homestead law up to the date of submitting proof.

Plats.—At the time of submitting proof the entryman shall file therewith triplicate plats of the survey of the land into lots, blocks, streets, and alleys, in the same form and manner, and containing reservations of not less than ten nor more than twenty acres, as required by the regulations herein for the entry of townsites under said section 22, the same to be duly verified by himself and the surveyor as in said regulations required, except that his oath shall show that his application is made under the provisions of the second proviso of said section 22.

Purchase price.—At the time of submitting the proof and plats, except as hereinafter provided, the claimant shall tender to the receiver a draft on New York, made payable to the order of the Secretary of the Interior, for the purchase price of the land, exclusive of the portions reserved for public purposes, at the rate of ten dollars per acre. The register and receiver will thereupon transmit the application, proof, and plats to this office with their joint report as to the status of the land, and at the same time they will transmit the draft to the Secretary of the Interior, making reference in each letter to the other.

Approval.—If the proof and plats are found by this office to be in accordance with these regulations and sufficient in form and substance, they will be forwarded to the Secretary of the Interior with recommendation that they be approved. Should they be so approved and the receipt of the purchase price of the land be acknowledged by the Secretary, one of the plats will be retained in this office and the other two will be returned to the district land officers, one to be retained by them and the other delivered to the applicant to be by him filed in the office of the recorder of deeds of the proper county, and the register will be directed to issue his certificate for the land embraced in said plats, excepting and excluding therefrom the tracts reserved for public purposes as designated on said plats. Receipt of the purchase money having been acknowledged by the Secretary of the Interior, no receipt will be issued by the receiver.

Notation on records.—On the issuance of the certificate of entry the register and receiver will note on their records the commutation of the applicant's homestead entry, in whole or in part, as the case may be. When patent is ready for delivery the entryman will be required, before the patent shall be delivered, to surrender his duplicate homestead receipt for transmittal to this office, if the entire homestead entry is commuted, or to have the commuted entry noted thereon and the same then returned to him, if commuted only in part.

Contests or protests.—Where an affidavit of contest or protest against the allowance of an application hereunder is filed at the time of submitting proof, or prior thereto, containing sufficient allegations, made and corroborated under oath to warrant a hearing, and the further allegation that the same is not initiated for the purpose of harassing the claimant and extorting money from him under a compromise, but in good faith to prosecute the same to a final determination, the register and receiver will take appropriate action thereon in accordance with the Rules of Practice. The local officers will not require tender of the purchase price of the land until the final determination of the case favorable to the application to purchase, and when so advised they must require the applicant to immediately tender a New York draft for such purchase price, made payable to the Secretary of the Interior, and on receipt thereof they will transmit it to the Secretary and advise this office thereof. Contest or protest affidavits filed after transmittal of proof will not be considered by the register and receiver, but will be immediately transmitted to this office. Appeals lie from the decisions of the register and receiver to this office, and from the decision of this office to the Secretary of the Interior, as in other cases, and all procedure thereon will be governed by the Rules of Practice.

Disposition of proceeds.—The moneys derived from the commutation of homestead entries for townsite purposes will be paid over to the proper authorities of the municipalities when organized, upon the receipt of the following required proof:

First. A duly certified copy, under seal of the order of the board of county commissioners, declaring that the specified territory shall, with the assent of the qualified voters, be an incorporated town; also the notice for a meeting of the electors, as required by paragraph 5 of article 1, chapter 16, of the statutes of Oklahoma.

Second. A like certified copy of the statement of the inspectors filed with the board of county commissioners, also a like certified copy of the order of said board, declaring that the town has been incorporated, as provided by paragraph 9 of said article 1.

Third. A like certified copy of the statement of the inspectors, filed with the county clerk, declaring who were elected to the office of trustees, clerk, marshal, assessor, treasurer, and justice of the peace, as provided by paragraph 16 of said article 1.

Fourth. A like certified copy, by the town clerk, of the proceedings of the board of trustees electing one of their number president; also a copy of the qualifications to act, by each of the officers mentioned, as provided by paragraph 19 of said article 1.

Fifth. A certified copy by the town clerk, of the proceedings of the board of trustees, designating some officer of the municipality to make application for and to receive the money to be paid by the Secretary of the Interior.

Sixth. A proper application for the money by said designated officer.

Said application shall be addressed to the Secretary of the Interior and may either be filed in the district land office for transmittal to this office or forwarded by the municipal authorities direct to this office. When the same is received by this office, if the application and accompanying evidence are in accordance with the requirements herein mentioned, it will be transmitted to the Secretary of the Interior and when

approved by him the money will be paid over to the designated officer to be used by the municipality for school purposes only as required.

Public reserves, how entered.—Applications for patents to the tracts reserved for public purposes, in all towns in Oklahoma created under said section 22 or under any other act where tracts have been reserved for such purposes under said section 22, may be filed on behalf of the municipalities whose corporate limits cover the land in which such reservations are situated. The application should be made by the mayor or other proper municipal officer, and describe the reservations to be patented according to the approved plats of said townsite, and the same should be accompanied with the proof of the municipal organization of the town similar to that above provided for the disposition of the proceeds derived from the commutation of homestead entries for townsite purposes under said section 22, and proof must also be filed therewith of the authority of the officer filing the application to make the same with the proper record evidence of his election and qualification as such officer. The application and proof must be filed in the district land office, and if the officers thereof find the same sufficient under these regulations the register will issue the certificate of entry in the form provided therefor.

Reservations in vacated townsites.—Under the act approved May 11, 1896 (29 Stat., 116), where a townsite or an addition to a townsite, in a homestead commuted to a townsite entry under the second proviso of section 22 of the act approved May 2, 1890 (26 Stat., 91), has been vacated under the laws of Oklahoma, and patents for the public reservations therein have not been issued, such reservations will be disposed of in the following manner:

First. Application and proof by the original entryman.—Application for a patent to such reservations may be filed by the original entryman within six months from the vacation of the townsite; and proof must be filed by him, with the register and receiver, of the due vacation of such townsite in accordance with the requirements of the laws of Oklahoma, which proof must consist of a copy of the record evidence of such vacation duly certified. Such proof must also be accompanied with evidence that the corporate authorities of the municipality, if one be organized, in which the reservations were situated prior to such vacation, have been personally served thirty days prior to making such proof with notice of the application and of the date the proof will be made. If the proof be found sufficient the entry will be allowed for the reservations as described in the townsite plat upon receipt of the payment of the homestead price. If the municipality is represented at the time of making proof, it may be heard in opposition to the application and decision be rendered thereon subject to appeal as in other cases.

Second. Reservations disposed of as isolated tracts.—In case of the failure of the original entryman to apply for patent to such reservations within six months from the vacation of such townsite, or in case such reserves have been patented to the municipality and it has ceased to exist by reason of such vacation, the reservations will be disposed of as isolated tracts under the provisions of section 2455, U. S. Rev. Stats., and the acts amendatory thereof, and the regulations issued thereunder.

Third. Reservations may be sold by an existing municipal corporation, upon the vacation of the townsite, where patent has been issued

to such municipality therefor, the proceeds of such sale to be covered into the school fund of such corporation. See case of City of Enid (30 L. D., 352).

IN MINNESOTA.

Townsites in ceded Indian lands under the act approved February 9, 1903 (32 Stat., 820), will be disposed of in accordance with the regulations herein provided for townsites created under sections 2380 and 2381, 2382 to 2386, or 2387 to 2393, U. S. Rev. Stats.

IN SOUTH DAKOTA.

Townsites in Rosebud ceded Indian lands in Tripp County, under the act approved March 2, 1907 (34 Stat., 1230 and 1231), will be disposed of in accordance with the regulations herein provided for the disposal of townsites under section 2381, U. S. Rev. Stats.

IN NORTH AND SOUTH DAKOTA.

Townsites in Cheyenne River and Standing Rock Indian lands, under the act approved May 29, 1908 (35 Stat., 461 and 463), will be disposed of in accordance with the regulations herein provided for the disposal of townsites under section 2381, U. S. Rev. Stats.

IN UTAH.

Townsites in the Uintah Indian lands, under act approved March 3, 1905 (33 Stat., 1069), will be disposed of in accordance with the regulations herein provided for townsites created under sections 2380 and 2381, 2382 to 2386, or 2387 to 2393, U. S. Rev. Stats.

IN NEVADA.

Townsites in the Walker River Indian lands, under act approved May 27, 1902 (32 Stat., 261), will be disposed of in accordance with the regulations herein provided for townsites created under sections 2380 and 2381, 2382 to 2386, or 2387 to 2393, U. S. Rev. Stats.

IN WYOMING.

Townsites in Shoshone or Wind River Indian lands, under act approved March 3, 1905 (33 Stat., 1021), will be disposed of in accordance with the regulations herein provided for townsites created under sections 2380 and 2381, 2382 to 2386, or 2387 to 2393, U. S. Rev. Stats.

IN MONTANA.

Townsites in Crow Indian lands, under act approved April 27, 1904 (33 Stat., 360 and 361), will be disposed of in accordance with the regulations herein provided for townsites created under sections 2380 and 2381, 2382 to 2386, or 2387 to 2393, U. S. Rev. Stats.

Townsites in Flathead Indian lands—Survey and appraisal.—Under the act approved June 21, 1906 (34 Stat., 354), townsites may be selected and reserved by the Secretary of the Interior, and thereafter they will be surveyed and platted into lots, blocks, streets, and alleys, and the lots appraised in accordance with the regulations in this circular provided for townsites surveyed, platted, and appraised under section 2381, U. S. Rev. Stats., but the appraisers shall, in addition to the work in such regulations required, also ascertain the names of the residents upon, and occupants of, any lots in such townsite, the character and extent of the improvements on such lots, and the name of the reputed owner thereof, and they shall report their findings thereon in connection with their report of appraisals, which report of findings shall be taken as *prima facie* evidence of the facts therein set out.

Filing of plat and appraisement.—When the plat and appraisement lists are approved, the same will be sent to the register and receiver for filing, and immediately on receipt thereof they will prepare a notice to the effect that such plat and list have been filed with them, stating the date thereof, and that they are ready to receive applications to make proof and entry for improved lots by persons claiming a preference right to enter the same at the appraised price, which applications and the proof thereon must be filed and made in time to secure entry prior to the date fixed for the public sale. Such notice will be given publicity by posting a copy thereof in a conspicuous place in the register's office, by giving copies thereof to the local newspapers as an item of news, by transmitting copies thereof to the postmaster in each townsite in which there is a post-office, and where there is none, then to the postmaster nearest the land, with a request that he post the same in a conspicuous place in his office, and by giving such further publicity thereto as may be done without incurring expense.

Preference right, application, and proof.—A preference right of entry, at the appraised price, of not exceeding two lots, is accorded an actual resident, to secure which entry the claimant must file in the district land office, in time to make proof and secure entry thereof prior to the date of public sale, an application therefor, showing that at the date the appraisers commenced their work upon the land the claimant was an actual resident upon one of the lots applied for, and the owner of substantial and permanent improvements thereon, and also the owner at said date of substantial and permanent improvements upon the other lot, if two are applied for, and that such residence and improvements have been maintained thereon to date of filing the application. A notice of intention to make proof must be filed and the notice for publication must be issued, published, and posted at the applicant's expense, as in ordinary cases, and in manner and form and for the time provided in the act approved March 3, 1879 (20 Stat., 472).

The proof may be made before the register and receiver or any officer duly authorized by law, and must show, by record or documentary evidence where such evidence is usually required, and where not so required, by the testimony of witnesses, (1) due publication of the register's notice; (2) the applicant's possession of and actual residence upon one of the lots applied for and his or her ownership of substantial and permanent improvements thereon at the date the appraisers commenced their work upon the land; (3) his or her possession and ownership of substantial and permanent improvements upon the other lot at the date the appraisers commence their work upon the land, if two lots are applied for; (4) the maintenance of such residence, possession, and improvements to date of filing the application; and (5) applicant's age, and if a minor or a married woman, whether he or she lives separate and apart from his or her parents and husband. The proof must embrace the testimony of the applicant and of at least two of his advertised witnesses. The appraised purchase price of each lot must be paid to the receiver at the time of submitting proof, except as hereinafter provided, and if the proof is found sufficient entry will be issued thereon.

Forfeiture, qualification, and restrictions.—All preference right of entry of improved or occupied lots, unentered on the day fixed for the public sale, will be forfeited, unless a contest be pending thereon as hereinafter provided, and such lots will be offered at public outcry in their regular order with the other unimproved and unoccupied lots. When notified of the date fixed for the public sale, the register and receiver will refuse to receive or consider any such application for entry where due publication could not be had and proof made thereon prior to the date so fixed for the public sale. Entry of public land under other laws, or in other townsites, or ownership of more than 320 acres will not disqualify an applicant. No entry can be made of an improved lot on which the claimant does not reside, unless his or her residence lot is included in the same or a previous entry.

Contests.—Hearings will be allowed and conducted in accordance with the Rules of Practice where two or more adverse applications are filed for the same lot, or where a sufficient contest or protest affidavit is filed against an application on or before the day fixed for making proof, but no purchase money will be collected from the applicants until the final determination of the case, whereupon the successful applicant will be required to pay the purchase price within thirty days from notice thereof.

Public sale.—The notice of public sale will be prepared and published in the form and manner herein provided for the sale of town lots under section 2381, U. S. Rev. Stats., and the sale will be conducted in the same manner and be subject to the same restrictions, and the certificates and applications for private entry must also be issued and filed in manner and form as provided in the regulations under said section 2381.

Townsites in Blackfeet and Fort Peck Indian lands.—That portion of the act approved March 1, 1907 (34 Stat., 1039), relating to townsites in the Blackfeet Indian lands, and section 14 of the act approved May 30, 1908 (35 Stat., 563), relating to townsites in the Fort Peck Indian lands, will be administered in accordance with the regulations

in this circular provided for townsites in the Flathead Indian lands, except that in townsites in the Fort Peck Indian lands five lots instead of two may be awarded preference-right claimants, under the conditions and restrictions provided in said regulations for the entry of two lots.

IN WASHINGTON.

Townsites in Colville and in Spokane Indian lands under the acts approved March 22, 1906 (34 Stat., 82, sec. 11), and May 29, 1908 (35 Stat., 459, sec. 4), respectively, will be selected and reserved by the Secretary of the Interior, and will thereafter be surveyed, appraised, and disposed of in accordance with the regulations in this circular provided under section 2381, U. S. Rev. Stats.

IN IDAHO.

Townsites in Coeur d'Alene Indian lands, under act approved June 21, 1906 (34 Stat., 337), will be selected and reserved by the Secretary of the Interior and thereafter surveyed, appraised, and disposed of in accordance with the regulations in this circular provided under section 2381, U. S. Rev. Stats.

IN CALIFORNIA AND ARIZONA.

Townsites in Yuma and Colorado River Indian lands, under that portion of the act approved April 30, 1908 (35 Stat., 77), relating to townsites in said lands, will be selected and reserved by the Secretary of the Interior and will be thereafter surveyed, appraised, and disposed of in accordance with the regulations in this circular provided under section 2381, U. S. Rev. Stats.

TOWNSITES IN RECLAMATION PROJECTS.

Withdrawal, survey, appraisalment, and sale.—Townsites in connection with irrigation projects may be withdrawn and reserved by the Secretary of the Interior under the acts approved April 16 and June 27, 1906 (34 Stat., 116, secs. 1, 2, and 3, and 519, sec. 4), respectively, and thereafter will be surveyed into town lots with appropriate reservations for public purposes, and will be appraised and sold from time to time in accordance with the regulations in this circular provided under section 2381, U. S. Rev. Stats.

The public reservations in each town shall be improved and maintained by the town authorities at the expense of the town; and upon the organization thereof as a municipal corporation, said reservations shall be conveyed to such corporation in its corporate name, subject to the condition that they shall be used forever for public purposes. To secure such conveyances the municipality shall apply through its proper officer for a patent to such reservations, and

furnish proof in manner, form, and substance as required under the regulations in this circular for patents to public reserves in Oklahoma townsites under section 22 of the act approved May 2, 1890 (26 Stat., 91).

PARKS AND CEMETERIES.

The right of entry under the act approved September 30, 1890 (26 Stat., 502), is restricted to incorporated cities and towns, and each of such cities and towns shall be allowed to make entries of tracts of unreserved and unappropriated public land, by government subdivisions, not exceeding, in all entries hereunder by such city or town, a quarter section in area, all of which must lie within three miles of the corporate limits of the city or town for which the entries are made.

Where on unsurveyed land.—If the public surveys have not been extended over the land sought by any city or town under the provisions of said act, it shall first be necessary for the proper corporate authority to apply to the surveyor-general of the district in which the tract in question is located for a special survey of the outboundaries of such tract. The application should describe the character of the land sought to be surveyed and, as accurately as possible, its area and geographical location. Tracts covered by such special surveys must be as nearly as practicable in square form, and entries of the same will not be allowed until after the surveys shall have been approved by the surveyor-general and accepted by the Commissioner of the General Land Office. The current appropriation for "surveying the public lands" being applicable to the survey of "lines of reservations," as well as to the extension of the ordinary lines of the system of public-land surveys, the cost of the surveys of all unsurveyed lands selected under the provisions of said act of September 30, 1890, will be paid for out of said appropriation, the same as the special surveys of the outboundaries of town sites and for like reasons (see case of Fort Pierre, 18 C. L. O., 117), and the deputies employed by the surveyor-general to execute such special surveys will report whether the land is either mineral in character or within an organized mining district.

Application and proof.—An application for the purposes indicated herein can only be made by the municipal authorities of an incorporated city or town; and in all cases the entries will be made and patents issued to the municipality in its corporate name, for the specific purpose or purposes mentioned in said act.

The land must be paid for at the government price per acre, after proof has been furnished satisfactorily showing—

First. Six weeks' publication of notice of intention to make entry, in the same manner as in homestead and other cases.

Second. The official character and authority of the officer or officers making the entry.

Third. A certificate of the officer having custody of the record of incorporation, setting forth the fact and date of incorporation of the city or town by which entry is to be made, and the extent and location of its corporate limits.

Fourth. The testimony of the applicant and two published witnesses to the effect that the land applied for is vacant and unappropriated by any other party, and as to whether the same is either mineral in character or located within an organized mining district or within a mining region.

Fifth. In case the land applied for is described by metes and bounds, as established by a special survey of the same, that the applicant and two of the published witnesses have testified from personal knowledge obtained by observation and measurements that the land to be entered is wholly within 3 miles of the corporate limits of the city or town for which entry is to be made.

Certificates.—Where the proof shows that the land is mineral in character, located in a mining district, or is within a region known as mineral lands, the certificate of entry shall contain the following proviso:

Provided, That no title shall be hereby acquired to any mineral deposits within the limits of the above-described tract of land, all such deposits therein being reserved as the property of the United States.

CEMETERIES.

Who may enter.—Under the act approved March 1, 1907 (34 Stat., 1052), the right to purchase public land for cemetery purposes is limited to religious, fraternal, and private corporations or associations, empowered to hold real estate for cemetery purposes by the laws under which they are organized. Such corporation or association shall be allowed to make but one entry of not more than eighty acres of contiguous tracts by government subdivisions of nonmineral, unreserved, and unappropriated public land.

Where on unsurveyed land.—If the public surveys have not been extended over the land so sought to be entered, the corporation or association should first apply to the proper surveyor-general for a special survey of the exterior lines of the tract desired, describing the topographical character of the land and its area and geographical location as accurately as possible. Such tracts must be as nearly as practicable in a rectangular form, and after the survey and plat thereof has been made, approved by the surveyor-general, accepted by this office, and filed in the local office, application may then be made for the entry of the land under said act. The cost of such surveys will be paid out of the current appropriation for "surveying the public lands," and the deputies employed will report whether the land is mineral in character.

The proof must satisfactorily show—

First. The filing of a notice of intention to make proof, the issuance, in manner and form so far as possible as in other cases provided, of the publication notice, to be published and posted for the time and in the manner provided by the act of March 3, 1879 (20 Stat., 472), and the regulations thereunder.

Second. The official character of the officer or officers applying on behalf of the association or corporation to make the entry, and his or their express authority to do so conferred by action of the association.

Third. A copy of the record, certified by the officer having charge thereof, showing the due incorporation and organization and date thereof of the association or corporation and its location and address. The law under which it is organized and by which it derives its authority to hold real estate for cemetery purposes must also be cited.

Fourth. That the land applied for is nonmineral, vacant, and unappropriated public land, and the extent to which it is used for cemetery purposes, and when first so used, if it is so used, which must be shown by the testimony of the applicant and two of the advertised witnesses.

Price.—The land must be paid for at such price per acre as shall be determined by the Commissioner of the General Land Office, provided that in no case shall the price be less than \$1.25 per acre.

Entries under this act must issue to the association or corporation in its corporate name, and the granting clause in the certificate should state that the patent to be issued for the tract described is "for cemetery purposes, subject to reversion 'to the United States should the land or any part thereof be sold or cease to be used for the purpose' in said act provided." Inasmuch, however, as the Commissioner of this office determines the amount of the purchase price under the existing conditions in each particular case, the register and receiver will, when proof is made to their satisfaction, immediately forward such proof to this office with their recommendation thereon without collecting any money as the purchase price and without issuing the final papers. If this office finds the proof satisfactory, the Commissioner will fix the purchase price, and the local officers will, on being notified thereof and no objection appearing thereto in their office, notify the applicant of the amount required and allow him thirty days from service of such notice to pay such purchase price, and on receipt thereof the entry will be issued.

Special order to Commissioner of June 11, 1896, is reissued as follows:

In addition to cases specified in departmental order of January 29, 1896 (22 L. D., 120), you are directed to transmit for disposition as "current work" all cases involving townsite entries.

In all cases classified as current work, when sending out notice of your decisions, you will inform the parties interested of that fact, and that the rules relating to filing arguments will be strictly enforced. 22 L. D., 675.

FRED DENNETT, *Commissioner*.

This circular approved, August 7, 1909.

JESSE E. WILSON,
Acting Secretary.

APPENDIX.

FORMS.

SCHEDULE OF APPRAISEMENT.

Valuation of lots and blocks in the townsite of _____, State of _____, appraised under—

Block.	Lot.	Area.	Valuation.		Character of land.	Remarks.
			Dollars.	Cents.		

_____, _____, 19—.

We, the undersigned, constituting the Board of Appraisers appointed under _____, to examine and appraise the surveyed and platted lots described in the foregoing list and designated on the approved plat of the townsite of _____, do hereby certify that on the _____ day (or days) of _____, 19—, we visited and examined each of said town lots; and that the valuation placed upon each lot as designated in the foregoing list is the fair, just, and full cash value thereof according to the best of our judgment.

_____ } Board of Appraisers.

No. _____.

APPLICATION UNDER SECTION 2387, U. S. REV. STATS.

DEPARTMENT OF THE INTERIOR,
LAND OFFICE AT _____, _____, 19—.

_____, as _____, of _____ County, State of _____, do hereby apply to purchase, under sections 2387 to 2393, inclusive, U. S. Rev. Stats., _____, Sec. _____, T. _____, R. _____ of _____ Principal Meridian, containing _____ acres, at the sum of \$ _____ for the townsite of _____.

My post-office address is _____.

I hereby certify that the land above described contains _____ acres, and that the purchase price therefor is \$ _____.

_____, Register.

No. —.

APPLICATION TO PURCHASE TOWN LOTS.

DEPARTMENT OF THE INTERIOR,

LAND OFFICE AT —, —, 19—.

—, —, of — County, State of —, do hereby apply to purchase, under —, Lot —, Block No. —, in the townsite of —, —, as delineated and designated in the approved plat thereof, containing —, at the sum of \$—.

My post-office address is —, —.

I hereby certify that the land above described contains —, and that the purchase price therefor is \$—.

—, Register.

No. —.

APPLICATION TO PREEMPT TOWN LOTS.

DEPARTMENT OF THE INTERIOR,

LAND OFFICE AT —, —, 19—.

I, —, of — County, State of —, do hereby apply to purchase, under —, Lot No. —, in Block No. —, in the townsite of —, —, as delineated and designated in the approved plat thereof, containing —, at the sum of \$—, basing said application on the following facts: That I am — years of age (and, if under 21 years of age, add, and the head of a family); that I am a native-born citizen of the United States (or have declared my intention to become a citizen of the United States); that my post-office address is —, —; and that my settlement, the date thereof, and the value and character of my improvements on said lot are as follows: —.

I hereby certify that the lot above described contain—, and that the purchase price thereof is \$—.

—, Register.

No. —.

APPLICATION FOR PREFERENCE RIGHT OF ENTRY IN FLATHEAD INDIAN LANDS, MONTANA.

DEPARTMENT OF THE INTERIOR,

LAND OFFICE AT —, —, 19—.

I, —, of — County, State of —, do hereby apply to purchase, under the Act approved June 21, 1906 (34 Stat., 354), Lot No. —, in Block No. —, in the townsite of —, —, as delineated and designated on the plat thereof approved by the Department of the Interior on —, 19—, containing —, at the appraised price of \$—, basing said application on actual residence and ownership of substantial and permanent improvements on said lot as follows: —.

I hereby certify that the lot above described contain—, and that the appraised purchase price thereof is \$—.

—, Register.

NOTICE OF INTENTION TO MAKE PROOF.

DEPARTMENT OF THE INTERIOR,
LAND OFFICE AT _____, 19__.

_____, as _____, having applied to purchase, under _____, the _____, hereby give notice of _____ intention to make proof, to establish _____ right under said law to enter the land above described, before the _____, at _____, on _____, 19__, by two of the following witnesses:
_____, of _____,
_____, of _____,
_____, of _____,
_____, of _____.

Notice of the above application will be published in the _____, printed at _____, which I hereby designate as the newspaper published nearest the land described.

_____, Register.

NOTICE FOR PUBLICATION OF MAKING PROOF.

DEPARTMENT OF THE INTERIOR,
LAND OFFICE AT _____, 19__.

Notice is hereby given that _____, as _____, has filed notice of his intention to make proof of his right to enter, under _____, the _____, and that said proof will be made before _____ at _____, on _____, 19__, and he names as his witnesses in making such proof—

_____, of _____,
_____, of _____,
_____, of _____,
_____, of _____.

_____, Register.

NOTICE OF PUBLIC SALE.

DEPARTMENT OF THE INTERIOR,
LAND OFFICE AT _____, 19__.

Notice is hereby given that on the _____ day of _____, 19__, at _____, beginning at 10 a. m. of that day and continuing thereafter from day to day as long as may be necessary, we will offer at public outcry to the highest bidder for cash at not less than the appraised value thereof _____, in the townsite of _____, _____, as delineated and designated on the plat of said townsite; approved _____, now on file in our office.

The purchase price must be paid in cash to the receiver before the close of his office on the day the bid is accepted.

All parties are warned under the penalty named in section 2373, U. S. Rev. Stats., against any combination or action tending to hinder or embarrass the sale of said lots or to prevent free competition between bidders.

_____, Register.
_____, Receiver.

No. ____.

CERTIFICATE OF ENTRY UNDER SECTION 2387.

DEPARTMENT OF THE INTERIOR,
LAND OFFICE AT _____, _____, 19____.

I hereby certify that, in pursuance of sections 2387 to 2393, U. S. Rev. Stats., _____, of _____ County, State of _____, has this day purchased for the sum of \$ _____, the _____ of section No. _____, in township No. _____, of range No. _____ of the _____ Principal Meridian, containing _____ acres, at the rate of \$ _____ per acre for the townsite of _____.

Now, therefore, be it known, that on the presentation of this certificate to the Commissioner of the General Land Office, the said _____ shall be entitled to receive a patent for the land above described, in trust for the several use and benefit of the occupants thereof, according to their respective interests.

_____, Register.

No. ____.

CERTIFICATE OF ENTRY FOR TOWN LOTS.

DEPARTMENT OF THE INTERIOR,
LAND OFFICE AT _____, _____, 19____.

I hereby certify that in pursuance of _____, _____, of _____ County, has this day purchased for the sum of \$ _____, Lot _____, No. _____, in Block No. _____, in the townsite of _____, containing _____, as the same _____ delineated and designated on the plat of said townsite, approved by the Secretary of the Interior on _____.

Now, therefore, be it known, that on the presentation of this certificate to the Commissioner of the General Land Office the said purchaser shall be entitled to receive a patent to said lot —.

_____, Register.

No. ____.

OKLAHOMA TOWNSITE RESERVATION CERTIFICATE.

DEPARTMENT OF THE INTERIOR,
LAND OFFICE AT _____, _____, 19____.

I hereby certify that, pursuant to the provisions of section 22 of the act of May 2, 1890 (26 Stat., 81), and the regulations thereunder, _____ (mayor or trustee) of the town (or city) of _____, in _____ County, Oklahoma, has made application for patent to said town (or city) for _____ in the townsite of _____, located on _____, Sec. _____, T. _____, R. _____, I. M., Oklahoma, reserved for said public purposes and delineated and designated on the plats of said townsite, approved by _____ on _____, said application being accompanied by satisfactory proof of the organization of said municipality, and of said _____ authority to make application for patent for said reservations.

Now, therefore, be it known that on presentation of this certificate to the Commissioner of the General Land Office, the said town (or city) of _____ shall be entitled to a patent for the tract (or tracts) of land above described, to be maintained for said public purposes as provided in the act herein mentioned.

_____, Register.

INSTRUCTIONS RELATIVE TO PUBLICATION OF FINAL-PROOF NOTICES
AND CONCERNING THE DISCRETIONARY AUTHORITY OF REGISTERS
IN THE SELECTION OF NEWSPAPERS FOR THAT PURPOSE.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 11, 1909.

Registers and Receivers of United States District Land Offices.

SIRS: This office is in daily receipt of complaints from editors and publishers of newspapers to the effect that their publications are not accorded the patronage which should be bestowed upon them, in accordance with the law and regulations governing the publication of notices of intended final proofs on entries of public lands.

The object of the law requiring publication of such notices is to bring to the knowledge and attention of all persons who are or who might be interested in the lands described therein, or who have information concerning the illegality or invalidity of the asserted claims thereto, the fact that it is proposed to establish and perfect such claims, to the end that they may interpose any objection they may have, or communicate information possessed by them to the officers of the land department. It is unnecessary to state that this object can not be secured by a notice published in a paper which has no meritorious circulation among the people resident in the locality in which the affected land is situated, and that inattention to or disregard of their duty in this behalf on the part of registers will result in the total subversion of the law and the defeat of its purpose and intent. To the end, therefore, that you may be fully instructed concerning your official obligation in the premises, and that you may be urged to an alert and diligent performance of the duty which the law imposes upon you, your attention is directed to the several rules now to be stated and which should govern and control you in the discharge of your official obligation:

First. A notice of intended final proof must be published in a newspaper of established character and of general circulation in the vicinity of the land affected thereby, such paper having a fixed and well-known place of publication. No newspaper shall be deemed a qualified medium of notice unless it shall have been continuously published during an unbroken period of six months immediately preceding the publication of the notice, nor unless it shall have applied for and been granted the privilege of transportation in and by the United States mails at the rate provided by law for second-class matter (secs. 427 to 437, inclusive, Postal Laws and Regulations), a privilege available to all newspapers having a legitimate list of subscribers and a known place of publication.

Second. The notice must in all cases be published in the newspaper which may be printed and issued at a place nearest to the lands which the notice affects. By the word "nearest" as here used it is not intended that geographical proximity shall be measured on an air line drawn between the land and the place of publication, but by the length of the shortest and principally traveled thoroughfare between such places, being the highway ordinarily used and employed for travel by vehicles of any kind. But this qualification shall not be intended as authorizing any manifest perversion of the spirit of the rule, but simply to dispense with any strict rule based on geographical distance.

Third. It is not necessary that the newspaper nominated as the medium of such notice shall be published in the same county as that in which the land lies, or even in the same land district. On the contrary, a newspaper published in an adjoining county, if its place of publication is nearer to the land than that of any other newspaper, *must* be designated as the agency of publication, if it is also qualified by reason of its general circulation in the vicinity of the affected lands.

Fourth. The law invests registers with discretion in the selection of newspapers to be the media of notice in such cases as are here referred to, but that discretion is official in character, and not a purely personal and arbitrary power to be exercised without regard for the object of the law by which it is conferred. It follows that a register's action in the exercise of such discretion is subject to review by this office in any case where it is sufficiently alleged that the discretion has been abused, meaning thereby that it has been exercised in a manner perverse of the object of the law in requiring such notices to be published. This power of review will ordinarily be exercised and made effective in a proper case by holding the final proof to have been preceded by insufficient notice; but it may be resorted to and exercised, in any case in which it may be shown that a register is *persistently* designating a manifestly inefficient medium of notice, by forbidding the further publication of notices in such a newspaper until it shall have acquired and sufficiently established its possession of the requisite qualifications. In other words, where it has once been determined that a newspaper is not a competent medium of notice, it is within the power of this office to forbid the continued selection of that newspaper as the means of publication without awaiting repeated abuses of discretion on the part of a register and a determination in each separate instance that the notice was ineffectually published. This course of action will, therefore, be pursued whenever it is shown that a register is bestowing his patronage upon an alleged newspaper which is not entitled to that character, being merely a private advertising agency or published for some special purpose and not as a general disseminator of news, or where such paper has no actual bona fide or reasonably meritorious circulation, or is not in fact published at its pretended place of publication, but at some other place.

Fifth. Where a register acts in the reasonable and not manifestly unfair and improper exercise of his discretion his decision will not be interfered with or disturbed by this office. The department can not and will not undertake to weigh and nicely calculate the relative efficiency of two or more newspapers published in the same

place and alike possessing and enjoying an established character and general circulation; nor will it, as between two papers published at different places, permit any slight and unimportant advantage in the matter of geographical proximity, period of publication, or extent of circulation, possessed by one of such papers over the other, to serve as a sufficient reason for disapproval of the register's conclusion as to which one of such newspapers should be designated as the means of publication.

Sixth. It is earnestly desired that you shall severally be at all times careful in your observance of and adherence to the rules which have been here stated and prescribed for your governance, to the end that the now numerous and urgent complaints of alleged discrimination, and charges to the effect that the object of the law is not observed in the choice of newspapers for the publication of final-proof notices, may be at least greatly diminished in number, as well as to the further end that such as may be received shall be without foundation of fact or in law.

Seventh. Persons seeking to establish their right to a legal title to any public lands are not authorized to interfere with the discretion of the register in the choice of a newspaper in which to publish notice of their claims; nor will any designation of a newspaper made by a register, in the reasonable exercise of that discretion, be disturbed on the ground that the claimant recommended another newspaper. All other conditions being equal, it will be entirely proper to accord favorable consideration to a claimant's nomination of a newspaper, though acceptance of such a nomination will not be enjoined upon you.

Eighth. None of the rules herein stated respecting the designation of the newspaper are intended to apply to, or govern, publication of notice concerning proof proposed to be offered in support of an application for the purchase of lands chiefly valuable for their timber or stone, under the act of Congress of June 3, 1878 (20 Stats., 89), as extended by the act of Congress of August 4, 1892 (27 Stats., 348), nor to the purchase of Alaskan coal lands under the act of Congress of April 28, 1904 (33 Stats., 525). Publication of such notices must be procured by the applicants, in newspapers selected by them, but this privilege does not exempt them from the obligation to select a newspaper published nearest to the lands to which the application relates, and such paper must be in all other respects a competent medium of notice, in accordance with the principles which have been stated. You will give to all applicants under this act due counsel and instruction concerning the duty imposed upon them in respect of publication of notice, to the end that they may not ignorantly err in the choice of newspapers through which to communicate such notice.

PROCEDURE IN CASES OF COMPLAINTS.

Ninth. No appeal will lie from the action of the register in refusing to name any particular newspaper as an agency for the publication of notices concerning claims to public lands. But any editor or proprietor of a newspaper who believes and desires to charge that a notice of proof in support of any claim to public land has been published in a paper disqualified by the rules and principles herein stated, to serve as the medium of such notice, may file in the district land

office from which such notice emanated a written and verified protest against the acceptance of the proof submitted in accordance with such notice. Such protest should set forth all material and essential facts within the knowledge of the protestant, or of which he has reliable information and which he believes to be true, and which, if duly established by proof, would require a determination that the newspaper in which the notice was published was and is not a reputable and established publication, printed, in good faith, for the diffusion of local and general news; or that it is and was not the paper published nearest to the land affected by said notice, and that there is another newspaper published at a place nearer to said lands, equally well qualified in all respects to convey notice of the claim thereto asserted; or any other cause of disqualification expressed and defined in and by the foregoing several rules.

Tenth. Any such protest must be accompanied by copies of at least three successive editions of the paper against whose efficiency as a means of notice the protest is directed, and by as many like copies of the paper published by protestant, and alleged to have been a more efficient agency of notice than was the paper actually chosen. It should, in addition to other facts hereby made essential, disclose the relative number of actual paying subscribers supporting the said two newspapers; the number of papers actually distributed in the county in which said papers are published and in the county in which the land is situated; and the number of papers mailed to bona fide subscribers at the post-office nearest to the land to which such notice relates. It should state the length of time during which each of said newspapers has been actually and continuously published, immediately preceding the date of the protest; and, if either of said papers has been denied, or has never applied for, entry as second-class matter in the post-office at the place of publication, that fact should be stated.

Eleventh. Where any protest has been filed in the manner herein prescribed it shall be the duty of the register and receiver to immediately consider same and to proceed thereon as in other cases of protests against final proofs. If they should conclude that the facts stated in the protest are insufficient to warrant an order for a hearing, they will render decision to that effect and duly notify the protestant thereof, at the same time advising him of his right to prosecute an appeal to this office, in the manner and within the time prescribed by the rules of practice. After the expiration of the period during which an appeal may be prosecuted, they will, if no such appeal be filed, forward the protest and accompanying exhibits to this office, with their decision thereon, as in cases of unappealed contests, together with a separate report by the register concerning the facts within his knowledge, and bearing, in a material manner, on the merits of the question presented by the protest.

Twelfth. In all cases where no appeal is prosecuted from a decision by the register and receiver dismissing a protest, that decision will be considered final as to the facts; and acquiescence therein by this office will be refused only when it is manifest that it was error to determine that no proper ground of protest was sufficiently alleged.

Thirteenth. The law imposes upon registers the duty of procuring the publication of proper final-proof notices, and charges the claimant with no obligation in that behalf, except that he shall bear and pay

the cost of such publication. Registers should accordingly exercise the utmost care in the examination of such notices and in the comparison thereof with the records of their offices, to the end that they may not go to the printer containing any erroneous description of the entered land, or designating an officer not authorized to receive the proof, or that they shall not be for any other reason insufficient. It is equally important that a notice correct in all of these particulars shall not be published in a newspaper manifestly disqualified as a means of publication and clearly incapable of bringing the notice to the attention of the people dwelling in the vicinity of the lands to which it relates.

Neglect of the duty above defined, resulting in a requirement of republication, should not visit its penalty upon the claimant. In all such cases, therefore, the register by whom the publication was procured will be required to effect the necessary republication at his own proper expense. If an error is committed by the printer of the paper in which the notice appears, the register may require such printer to correct his error by publishing the notice anew for the necessary length of time, and for his refusal to do so may decline to designate his said paper as an agency of notice in cases thereafter arising.

LAWS AND REGULATIONS.

For your more complete instruction concerning the subject-matter of these rules, and as a means of affording a ready and convenient reference to the several laws and regulations providing for and requiring publication of notice in relation to entries of and claims to public lands, those laws and regulations are here assembled. A careful examination thereof will familiarize you with the language in which they express their requirements and indicate to you their evident purpose.

Homestead and preemption entries.

- (1) *Act of Congress of March 3, 1879 (20 Stat., 472).*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That before final proof shall be submitted by any person claiming to enter agricultural lands under the laws providing for preemption or homestead entries, such person shall file with the register of the proper land office a notice of his or her intention to make such proof, stating therein the description of the lands to be entered, and the names of the witnesses by whom the necessary facts will be established.

Upon the filing of such notice, the register shall publish a notice that such application has been made, once a week for the period of thirty days, in a newspaper to be by him designated as published nearest to such land, and he shall also post such notice in some conspicuous place in his office for the same period. Such notice shall contain the names of the witnesses as stated in the application. At the expiration of said period of thirty days, the claimant shall be entitled to make proof in the manner heretofore provided by law. The Secretary of the Interior shall make all necessary rules for giving effect to the foregoing provisions.

- (2) *Circular of April 10, 1909, paragraphs 40, 41, and 42, continuing in force the principle of a requirement announced by earlier circulars.*

40. *How proofs may be made.*—Final or commutation proofs may be made before any of the officers mentioned in paragraph 16, as being authorized to administer oaths to applicants.

Any person desiring to make homestead proof should first forward a written notice of his desire to the register and receiver of the land office, giving his post-office address, the number of his entry, the name and official title of the officer before whom he desires to make proof, the place at which the proof is to be made, and the name and post-office addresses of at least four of his neighbors who can testify from their own knowledge as to facts which will show that he has in good faith complied with all the requirements of the law.

41. *Publication fees.*—Applicants shall hereafter be required to make their own contracts for publishing notice of intention to make proof, and they shall make payment therefor directly to the publisher, the newspaper being designated and the notice prepared by the register.

42. *Duty of officers before whom proofs are made.*—On receipt of the notice mentioned in the preceding paragraph, the register will issue a notice naming the time, place, and officer before whom the proof is to be made and cause the same to be published once a week for five consecutive weeks in a newspaper of established character and general circulation published nearest the land, and also post a copy of the notice in a conspicuous place in his office. * * *

Desert-land entries.

(1) *Circular of June 27, 1887 (5 L. D., 708), paragraph 13.*

13. Before final proof shall hereafter be submitted by any person claiming to enter lands under the desert-land act, such person will be required to file a notice of intention to make such proof, which shall be published in the same manner as required in homestead and preemption cases.

(2) *Act of Congress of March 11, 1902 (32 Stat., 63), giving implied statutory sanction to above-quoted circular requirement.*

That hereafter all affidavits, proofs, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, preemption, timber-culture, desert-land, and timber and stone acts, may, in addition to those now authorized to take such affidavits, proofs, and oaths, be made before any United States commissioner or commissioner of the court exercising federal jurisdiction in the Territory or before the judge or clerk of any court of record in the land district in which the lands are situated: *Provided*, That in case the affidavits, proofs, and oaths hereinbefore mentioned be taken out of the county in which the land is located the applicant must show by affidavit, satisfactory to the Commissioner of the General Land Office, that it was taken before the nearest or most accessible officer qualified to take said affidavits, proofs, and oaths in the land districts in which the lands applied for are located; *but such showing by affidavit need not be made in making final proof, if the proof be taken in the town or city where the newspaper is published in which the final proof notice is printed.*

* * *

(3) *Circular of November 30, 1908 (37 L. D., 312), paragraphs 20 and 21, repeating requirement of publication.*

20. The entryman, or his assignee, if the entry has been assigned, is ordinarily allowed four years from the date of the entry in which to complete the reclamation of the land, and he is entitled to make final proof and receive patent as soon as he has expended the sum of \$3 an acre in improving and reclaiming the land, and has reclaimed all of the irrigable land embraced in his entry, and has actually cultivated one-eighth of the entire area of the land entered. When an entryman has reclaimed the land and is ready to make final proof he should apply to the register and receiver for a notice of intention to make such proof. This notice must contain a complete description of the land and must describe the entry by giving the number thereof and the name of the entryman. If the proof is made by an assignee, his name as well as that of the original entryman should be stated. It must also show when, where, and before whom the proof is to be made. Four witnesses may be named in this notice, two of whom must be used in making the proof.

21. This notice must be published once a week for five successive weeks in a newspaper of established character and general circulation published nearest the land, and it must also be posted in a conspicuous place in the local land office for the same period of time. The date fixed for the taking of the proof must be at least thirty days after the date of first publication. Proof of publication must be made by the affidavit of the publisher of the newspaper or by some one authorized to act for him. The register will certify to the posting of the notice in the local office.

Timber and stone cash entries.

(1) *Act of Congress of June 3, 1878 (20 Stat., 89), section 3.*

SEC. 3. That upon the filing of said statement, as provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and

seventy-two, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon: *Provided*, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him; stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

- (2) *Circular of November 30, 1908 (37 L. D., 289), paragraph 25, expressing the requirement imposed by section 3 of the above-mentioned act.*

(NOTE.—It will be observed that an applicant for the purchase of lands chiefly valuable for timber and stone is required to procure publication of notice of his application in a newspaper published nearest to the lands which he seeks to purchase. In such cases the register does not designate the newspaper; but it is the duty of the register and receiver, nevertheless, to enforce the requirement that a such a notice shall be published in the paper nearest to the land, and they will reject any proof which is not preceded by notice published in the papers so qualified.)

25. After the appraisalment or reappraisalment and deposit of purchase money and fee have been made the register will fix a time and place for the offering of final proof, and name the officer before whom it shall be offered, and post a notice thereof in the land office and deliver a copy of the notice to the applicant, to be by him and at his expense published in the newspaper of accredited standing and general circulation published nearest the land applied for. This notice must be continuously published in the paper for sixty days prior to the date named therein as the day upon which final proof must be offered.

Carey act selections.

- (1) *Act of Congress of August 18, 1894 (28 Stat., 372, 422), commonly known as the "Carey Act." (Section 2.)*

* * * As fast as any State may furnish satisfactory proof, according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed, and occupied by actual settlers, patents shall be issued to the State or its assigns for said lands so reclaimed and settled: *Provided*, That said States shall not sell or dispose of more than one hundred and sixty acres of said lands to any one person, and any surplus of money derived by any State from the sale of said lands in excess of the cost of their reclamation, shall be held as a trust fund for and be applied to the reclamation of other desert lands in such State. That to enable the Secretary of the Interior to examine any of the lands that may be selected under the provisions of this section, there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, one thousand dollars.

- (2) *Circular of April 9, 1909, renewing and repeating provisions of previous circulars (paragraph 15).*

15. When said list is filed in the local land office, there shall also be filed by the State a notice, in duplicate, prepared for the signature of the register and receiver, describing the land by sections, and portions of sections, where less than a section is designated (Form 8, p. 15). This notice shall be published at the expense of the State once a week in each of nine consecutive weeks, in a newspaper of established character and general circulation, to be designated by the register as published nearest the land. One copy of said notice shall be posted in a conspicuous place in the local office for at least sixty days during the period of publication.

Grants to States and Territories for educational purposes.

- (1) *Circular of April 25, 1907 (35 L. D., 537), paragraphs 9, 10, and 11.*

9. Notice of selection of *all lands* must be given by publication once a week for five successive weeks in a newspaper of general circulation in the county where the lands are located, the paper to be designated by the register.

10. Notices for publication will be prepared by the register at the time of the acceptance of the selections, and will be transmitted by registered mail to the proper State or Territorial official for publication in the paper or papers designated, and a copy of such notice shall also be posted by the register in a conspicuous place in his office, and remain so posted until the expiration of time allowed for the submission of proof of publication.

To save expense, the register may embrace two or more lists in one publication when it can be done consistently with the requirement of publication in a newspaper of general circulation in the county where the land is situated.

The published notice will embrace only the selected lands described by the largest legal subdivisions embraced in the separate lists, care being taken to avoid repetition of numbers of sections, townships, and ranges.

11. Proof of publication will be the affidavit of the publisher or foreman of the newspaper employed, that the notice (a copy of which must be annexed to the affidavit) was published in said newspaper once a week for five successive weeks. Such affidavit must show that the notice was published in the regular and entire issue of the paper, and was published in the newspaper proper and not in a supplement.

The proof of publication of notice must be filed with the register within ninety days after receipt of notice for publication, and will be forwarded by the register to the General Land Office with a report as to whether protest or contest has been filed against any selection, and if protest or contest is filed, the same shall accompany the report. Failure by the State or Territory to furnish proof of publication within the time limited will be cause for the rejection of the selection, upon report of such failure by the register, accompanied with evidence of service of notice prescribed in rule 10.

* * *

Isolated tracts of public lands.

- (1) *Section 2455, U. S. Revised Statutes, as amended by the act of Congress of June 27, 1906 (34 Stat., 517).*

SEC. 2455. It shall be lawful for the Commissioner of the General Land Office to order into market and sell, at public auction at the land office of the district in which the land is situated, for not less than one dollar and twenty-five cents per acre, any isolated or disconnected tract or parcel of the public domain not exceeding one quarter section which, in his judgment, it would be proper to expose for sale *after at least thirty days' notice by the land officers of the district in which such land may be situated: Provided, That this act shall not defeat any vested right which has already attached under any pending entry or location.*

- (2) *Circular of July 18, 1906 (35 L. D., 44), paragraph 7.*

7. When lands are ordered to be exposed at public sale, the register and receiver will cause a notice to be published once a week for five consecutive weeks (or for thirty consecutive days if a daily paper), immediately preceding date of sale, in a newspaper to be designated by the register as published nearest the land described in the application, using the form hereinafter given. The register will also cause a similar notice to be posted in the local land office, such notice to remain so posted during the entire period of publication. The applicant must furnish proof that publication was duly made.

Scrip, military bounty land warrants, soldiers' additional homestead entries, forest reserve and other lieu selections and locations.

- (1) *Circular of February 21, 1908 (36 L. D., 278), paragraphs 2 and 3.*

2. You will require the locator or selector, within twenty days from the filing of his location or selection, to begin publication of notice thereof, at his own expense, in a newspaper to be designated by the register as of general circulation in the vicinity of the land, and to be the nearest thereto. Such publication must cover a period of thirty days, during which time a similar notice of the location or selection must be posted in the local land office and upon the lands included in the location or selection, and upon each and every noncontiguous tract thereof.

3. The notice must describe the land located or selected, give the date of location or selection, and state that the purpose thereof is to allow all persons claiming the land adversely, or desiring to show it to be mineral in character, an opportunity to file objection to such location or selection with the local officers for the land district in which the land is situate, and to establish their interest therein, or the mineral character thereof.

Mineral lands and mining resources.

- (1) *Section 2325, U. S. Revised Statutes.*

SEC. 2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land

for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

(2) *Mining Regulations of March 29, 1909 (37 L. D., 728), rules 45, 46, and 47.*

45. Upon the receipt of these papers, if no reason appears for rejecting the application, the register will, at the expense of the claimant (who must furnish the agreement of the publisher to hold applicant for patent alone responsible for charges of publication), publish a notice of such application for the period of sixty days in a newspaper published nearest to the claim, and will post a copy of such notice in his office for the same period. When the notice is published in a *weekly* newspaper, nine consecutive insertions are necessary; when in a *daily* newspaper, the notice must appear in each issue for sixty-one consecutive issues. In both cases the first day of issue must be excluded in estimating the period of sixty days.

46. The notices so published and posted must embrace all the data given in the notice posted upon the claim. In addition to such data the published notice must further indicate the locus of the claim by giving the connecting line, as shown by the field notes and plat, between a corner of the claim and a United States mineral monument or a corner of the public survey, and thence the boundaries of the claim by courses and distances.

47. The register shall publish the notice of application for patent in a paper of established character and general circulation, to be by him designated as being the newspaper published nearest the land.

Coal lands.

(1) *Section 2325 U. S. Revised Statutes.* (See said section quoted above.)

(2) *Circular of April 12, 1907 (35 L. D., 665), reprinted July 11, 1908, paragraphs 17 and 18.*

17. Upon the filing of an application to purchase coal lands under the provisions of paragraphs 10 or 14 the applicant will be required, at his own expense, to publish a notice of said application in a newspaper nearest the lands, to be designated by the register, for a period of thirty days, during which time a similar notice must be posted in the local land office and in a conspicuous place on the land. The notice should describe the land applied for and state that the purpose thereof is to allow all persons claiming the land applied for, or desiring to show that the applicant's coal entry should not be allowed for any reason, an opportunity to file objections with the local land officers.

Publication must be made sufficiently in advance to permit entry within the year specified by the statute.

18. After the thirty days' period of newspaper publication has expired, the claimant will furnish from the office of publication a sworn statement (including an attached copy of the published notice) that the notice was published for the required period, giving the first and last date of such publication, and his own affidavit, or that of some credible person having personal knowledge of the fact, showing that the notice aforesaid remained conspicuously posted upon the land sought to be patented during said thirty days' publication, giving the dates. The register shall certify to the fact that the notice was posted in his office for the full period of thirty days, the certificate to state distinctly when such posting was done and how long continued, giving the dates. In no case shall entry be allowed until the proofs specified have been filed. * * *

Exchange of public lands for lands in private ownership within the limits of any Indian reservation created by executive order.

(1) *Act of Congress of April 21, 1904 (33 Stat., 211).*

That any private land over which an Indian reservation has been extended by executive order, may be exchanged at the discretion of the Secretary of the Interior and at the expense of the owner thereof, and under *such rules and regulations as may be prescribed by the Secretary of the Interior*, for vacant, nonmineral, nontimbered, surveyed public lands of equal area and value and situated in the same State or Territory.

(2) *Circular of March 3, 1909 (37 L. D., 537), paragraphs 11 and 12.*

11. In all cases you will require the applicant, within twenty days from the filing of his application, to begin publication of notice thereof at his own expense in a newspaper to be designated by the register as of general circulation in the vicinity of the land and published nearest thereto. Such publication must cover a period of thirty days, during which time a similar notice of the application must be posted in the local land office and upon each and every noncontiguous tract included in the application.

12. The notice should describe the land applied for and give the date of application, and state that the purpose thereof is to allow all persons claiming the land under the mining or other laws, desiring to show it to be mineral in character or adversely occupied, an opportunity to file objection to such application with the local officers of the land district in which the land is situated and to establish their interest therein or the mineral character thereof.

Alaskan coal lands.

(1) *Act of Congress of April 28, 1904 (33 Stats., 525), section 2.*

SEC. 2. That such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting, at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated an application therefor, accompanied by a certified copy of a plat of survey and field notes thereof, made by a United States deputy surveyor or a United States mineral surveyor, duly approved by the surveyor-general for the district of Alaska, and a payment of the sum of ten dollars per acre for the lands applied for; but no such application shall be allowed until after the applicant has caused a notice of the presentation thereof, embracing a description of the lands, to have been published in a newspaper in the district of Alaska published nearest the location of the premises for a period of sixty days, and shall have caused copies of such notice, together with a certified copy of the official plat or survey, to have been kept posted in a conspicuous place upon the land applied for and in the land office for the district in which the lands are located for a like period, and until after he shall have furnished proof of such publication and posting, and such other proof as is required by the coal-land laws: *Provided*, That nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district.

(2) *Circular of July 18, 1904 (33 L. D., 114).*

Upon the presentation of an application for patent, as provided by section 2, if no reason appears for rejecting the application, the same will be received by the register and receiver and the claimant required to publish a notice of such application for the period of sixty days in a newspaper in the district of Alaska published nearest the location of the particular lands, and the register will post a copy of such notice in his office for the same period. When the notice is published in a weekly newspaper, 9 consecutive insertions are necessary. When in a daily newspaper, the

notice must appear in each issue for 61 consecutive issues. In both cases the first day of issue must be excluded in estimating the period of sixty days.

The notice so published and posted must embrace all the data given in the notice posted upon the claim. In addition to such data, the published notice must further indicate the locus of the claim by giving the connecting line as shown by the field notes and plat between a corner of the claim and a United States mineral monument or a corner of the public survey, if there is one, and fix the boundaries of the claim by courses and distances.

Very respectfully,

S. V. PROUDFIT,
Acting Commissioner.

Approved, August 11, 1909.

JESSE E. WILSON,
Acting Secretary.

UMATILLA INDIAN LANDS—ENTRY BY MARRIED WOMAN.

INGRAM *v.* GUERNSEY.

A married woman not the head of a family is not qualified to make entry of Umatilla Indian lands opened to disposition under the acts of March 3, 1885, and July 1, 1902, and an entry made by one so disqualified is not confirmed by the acts of March 3, 1905, and June 29, 1906.

First Assistant Secretary Pierce to the Commissioner of the General
(W. C. P.) *Land Office, August 17, 1909.* (J. H. T.)

The Department, October 24, 1908, denied motion for review of its decision of June 6, 1908, affirming the decision of your office of November 26, 1907, holding for cancellation Umatilla cash entry No. 485, made by Bertha B. Guernsey for the NE. $\frac{1}{4}$, Sec. 22, T. 1 N., R. 34 E. (untimbered), and the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 23, T. 1 N., R. 35 E., W. M. (timbered), September 15, 1902, upon which was submitted final proof, September 27, 1905, at the La Grande, Oregon, land office. Said action was taken upon the contest of William Ingram.

In an agreed statement of facts by the parties, it was stipulated that claimant was the wife of Henry C. Guernsey at the date of her said entry, and lived with him until his death in July, 1903; that her husband also made an entry of Umatilla land at the same time that she made her said entry; that the lands covered by her entry are not agricultural lands but are chiefly valuable for grazing purposes, and that she has never resided upon said lands.

It was urged in the contest proceedings that the said Bertha B. Guernsey was not qualified to make such entry by reason of being a married woman, and also that she had not complied with the law and the instructions issued thereunder in either residing upon the land or using the same for grazing. The question of her qualification was not decided by the Department, but her entry was ordered canceled by reason of the fact that she had not either lived upon the land or used the same for grazing.

July 26, 1909, counsel for the entrywoman filed a petition or motion for reconsideration of the case in view of the decision rendered June

11, 1909, in the case of Daniel C. Bowman, wherein it was held that in such cases where the land was shown not to be suitable for use other than for grazing purposes, the remedial acts of March 3, 1905, and June 29, 1906, relieved the entryman from residence, cultivation or the use of the land for grazing where full payment was made prior to the date of said acts and it was shown that the land was not suitable for use other than for grazing purposes.

The act of March 3, 1885 (23 Stat., 340), providing for the disposition of the Umatilla lands at public sale to the highest bidder at not less than the appraised value, states that—

Each purchaser shall, at the time of making his purchase, make and subscribe an oath or affirmation that he is purchasing said lands for his own use and occupation; . . . and before a patent shall issue for the untimbered lands the purchaser shall make satisfactory proof that he has resided upon the lands purchased at least one year, and has reduced at least twenty-five acres to cultivation.

The act of July 1, 1902 (32 Stat., 730), provided for the disposition of the remaining lands at private sale under the conditions stated in the first act at the appraised price.

It has been held uniformly that a married woman not the head of a family is not qualified to make entry under the homestead law, as she is not free to select or maintain a residence separate and apart from her husband. See *Bush v. Leonard* (25 L. D., 129); *Case v. Kupferschmidt* (30 L. D., 9). This rule has had legislative recognition in the remedial act of June 6, 1900 (31 Stat., 683), which allows a married woman to make homestead entry where settlement is made upon the land prior to marriage and continued.

The residence required by the acts which govern the making of entries for the Umatilla lands is of the same character as that required by the homestead law—that is, the entryman must make his actual home upon the land to the exclusion of a home elsewhere for the time specified. The entry of Guernsey, having been made by a person not qualified to make such entry, was therefore illegal and void.

It remains to be considered whether the remedial acts of March 3, 1905 (33 Stat., 1048), and June 29, 1906 (34 Stat., 611), are effective to confirm said entry. The aforesaid act of March 3, 1905, which was re-enacted June 29, 1906, provides:

That all persons who have heretofore purchased any of the lands on the Umatilla Indian Reservation and have made full and final payment thereof in conformity with the acts of Congress of March 3, 1885, and July 1, 1902, respecting the sale of such lands, shall be entitled to receive patent therefor upon submitting satisfactory proof to the Secretary of the Interior that the untimbered lands so purchased are not susceptible of cultivation or residence and are exclusively grazing lands incapable of any profitable use other than for grazing purposes.

As stated above, it was stated in the case of Daniel C. Bowman that where final payment had been made prior to the date of the said acts, respectively, and it was shown that the lands are not susceptible of cultivation or residence and are suitable only for grazing purposes, it is not necessary that the lands be actually grazed. It was not held, however, that an entry which was illegally initiated was confirmed or in any way affected by said remedial acts. It is not believed that it was the intention of Congress to confirm illegal entries, but that it was only the intention to relieve entrymen who had made entry and full and final payment thereof "in conformity with the acts of Congress of March 3, 1885 and July 1, 1902," from residence, cultivation, or use for grazing when the lands are shown to be not suitable for residence or cultivation.

The Department therefore holds that a married woman not the head of a family is not qualified to make entry of the Umatilla lands, and that the remedial acts above quoted do not confirm entries which were made by such persons.

The records of your office show that the entry of Guernsey has been canceled, and that Ingram has made entry for the lands.

The petition is denied.

PRACTICE—CORROBORATING AFFIDAVITS TO AFFIDAVIT OF CONTEST—RULE 3.

CHARLES F. WHITEHEAD.

Under Rule 3 of Practice it is within the discretion of local officers to require more than one corroborating affidavit to an affidavit of contest, and where they adopt a rule that two corroborating affidavits must in all cases be furnished, such exercise of discretion on their part will not be interfered with.

First Assistant Secretary Pierce to the Commissioner of the General
(W. C. P.) *Land Office, August 17, 1909.* (J. F. T.)

Charles F. Whitehead has appealed to the Department from your decision of June 14, 1909, modifying the action of the register and receiver, which rejected his contest affidavit filed January 8, 1909, against homestead entry number 22194 (Clayton series), now serial 03737, made January 6, 1908, by Pearl E. Trierer, for the SE. $\frac{1}{4}$, Sec. 30, T. 3 N., R. 30 E., N. M. P. M., Tucumcari, New Mexico, land district.

The contest affidavit of Whitehead alleged that the said Pearl E. Trierer had wholly abandoned the land, that she had changed her residence therefrom for more than six months since making the entry, and that the tract was not settled upon and cultivated by her.

The register and receiver rejected the affidavit for the following reasons:

We rejected said affidavit for the reason that only one witness was furnished in corroboration thereof.

We have adopted the rule to require two corroborating witnesses to each affidavit of contest. We deemed this necessary in order to protect the office from a large number of speculative and friendly contests, which we believed were being filed. This decision has been arrived at from the fact that quite a number of the contestants dismiss their cases when they find that they are going to have to prosecute them or have them dismissed.

Your decision affirmed this holding of the register and receiver, but permitted the contestant to file an additional corroborative affidavit within ten days from notice. The appeal is prosecuted by the agent for the contestant, who states that he is now in Oklahoma and that it will be impossible for him to go to New Mexico in sufficient time to obtain the required corroboration.

In your letter to the register and receiver deciding this case, you say:

In your letter of transmittal you state:

"We have adopted the rule to require two corroborating witnesses to each affidavit of contest. We deemed this necessary in order to protect the office from a large number of speculative contests which we believed were being filed."

In my letter "H" of June 1, 1909, in the case of *Williams v. Comstock*, the question here presented was incidentally raised; but in its action this office was chiefly influenced by the clear insufficiency of the reason assigned by you for holding *Williams'* affidavit of contest speculative. Upon mature reflection the rule referred to in your letter, above quoted, is believed to be a reasonable one. Under Rule of Practice 3 the affidavit of contest, which is not jurisdictional but for your information only, must be corroborated by one or more persons, and in the absence of a clear showing that the requirement of two witnesses is an abuse of your discretion in the premises, this office must decline to interfere with your praiseworthy efforts to prevent the bringing of speculative contests.

It would be better, where affidavits are filed having but one corroborative witness, to give the contestant a reasonable time in which to secure the additional affidavit, rather than to reject it outright. You will therefore, advise Whitehead that, unless within ten days from the receipt of a copy of this decision he files in your office an additional corroborative affidavit to his affidavit of contest, or appeals herefrom within the time allowed by law, said contest will be dismissed without further notice to him. Your decision is modified accordingly, but the decision of this office in the case of *Williams v. Comstock* is adhered to.

The only question presented to the Department upon this appeal is the advisability and propriety of requiring two corroborating witnesses upon contest affidavits in the local office at Tucumcari, New Mexico, under the conditions described as above quoted in that district at the present time. The requirement of Rule 3 of the Rules of Practice is that:

Where an entry has been allowed and remains of record, the affidavit of the contestant must be accompanied by the affidavits of one or more witnesses in support of the allegations made.

It is therefore clear that such rule leaves discretion somewhere as to whether more than one corroborating witness shall be required,

and such discretion must be lodged either in the local officers or in your office, and as both have agreed that the circumstances and conditions existing in the Tucumcari land district are such that it is wise and proper to require more than one corroborating witness, the Department, using your own language to the local officers, "must decline to interfere with your praiseworthy efforts to prevent the bringing of speculative contests." This holding does not necessitate the immediate return of contestant to New Mexico, as the required affidavit can be obtained by his authorized agent who acts for him in this appeal.

Your decision is accordingly affirmed.

WITHDRAWAL—RESTORATION—WHEN ORDER OF RESTORATION
EFFECTIVE.

GEORGE B. PRATT ET AL.

Where lands which have been withdrawn from all disposition are restored to entry, no application will be received or any rights recognized as initiated by the tender of an application for any such lands until the order of restoration is received at the local office.

First Assistant Secretary Pierce to the Commissioner of the General
(W. C. P.) *Land Office, August 17, 1909.* (J. H. T.)

August 24, 1905, the lands in T. 34 N., R. 26 E., W. M., Waterville, Washington, were withdrawn from all disposition under the first form, act of June 17, 1902. (32 Stat., 388).

February 23, 1907, Charles E. Weatherstone made homestead application for the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 33; the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 34, T. 34 N., R. 26 E., and the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 3, T. 33 N., R. 26 E., which was rejected because at that time the land in T. 34 N., R. 26 E., above described, was not subject to entry, and upon appeal the action of the local office was affirmed July 11, 1907, by your office. Upon further appeal to the Department the papers were remanded to your office February 28, 1908, for appropriate action, by reason of the fact that by order of February 17, 1908, upon the recommendation of the Reclamation Service, that portion of the land above described in T. 34 N., R. 26 E., was directed to be restored to entry under the second form subject to the provisions of the reclamation act.

By your letter "C" of March 17, 1908, action was taken on the case of Weatherstone in accordance with the directions of departmental order of February 28, 1908, and in view of the fact that the lands had been restored to entry under the second form it was directed that Weatherstone be allowed sixty days within which to make entry subject to the provisions of said act.

February 28, 1908, George B. Pratt made homestead application for the SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 34, T. 34 N., R. 26 E., being a part of the land theretofore applied for by Weatherstone. The application of Pratt was rejected by the local office February 29, 1908, because the records of that office showed that the land was still withdrawn under the first form. Upon appeal to your office, the action of the local office was reversed in your letter "K" of April 16, 1908, in view of the fact that, as stated in your letter, the land had been restored to entry under the second form. You further stated therein that the change in the form of withdrawal became effective on February 17, 1908. However, by your letter "K" of May 14, 1908, you rescinded your action of April 16, 1908, and rejected the application of Pratt because of the conflicting application of Weatherstone. Upon appeal to the Department your decision of May 14, 1908, was affirmed by departmental decision of April 26, 1909. A motion for review of said decision has been filed.

In the motion for review it is stated that Pratt's application was the first legal application after the land became subject to entry, and that the restoration became effective as of date February 17, 1908, although the order had not at that time reached the local office, and according to the local office records at the time Pratt filed his application the land was still withdrawn under the first form.

It is stated in the record that Weatherstone on March 5, 1908, filed a second application for the same lands embraced in his first application, which application was suspended by the local officers to await instructions, inasmuch as his first application was still pending on appeal. The records also show that the said departmental order of February 17, 1908, changing the withdrawal from the first to the second form, was promulgated by your letter "K" of February 26, 1908, directed to the local office. It is not shown when that order was received at the local land office, but by letter of March 13, 1908, the local officers acknowledged the receipt of same and reported that they had noted the change on their records. There appears to be no doubt that the said order restoring the land to entry under the second form must have been received at the local land office prior to March 5, 1908, at the time Weatherstone filed his second application. It also appears that said order could not have reached the local office prior to the time when Pratt filed his application—February 28, 1908. It therefore appears that Weatherstone must have been the first person to apply for the land in conflict after the said order of restoration had been received at the local land office. The material question to be considered is whether the restoration should be held as taking effect at the date it was made, to-wit, February 17, 1908, or at the time it was received at the local land office.

After very careful consideration of this matter the Department is of the opinion that such restorations should be given effect so as to make the lands subject to entry only from the time the same are received at the local land office. Any other rule would be impracticable for administrative purposes. This view is in harmony with other similar rules now in force. Circular of July 14, 1899 (29 L. D., 29), directs that—

no application will be received or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record until said entry has been cancelled upon the records of the local office. . . . Cancellation of entry should be promptly noted upon your records upon receipt of instructions from this office to that effect.

Also, the circular of July 13, 1908 (37 L. D., 27), directs that where the Secretary of the Interior by approval of farm-unit plats has determined that the lands designated thereon are irrigable, "the filing of such plats in the office of the Commissioner of the General Land Office and in the local offices shall be regarded as equivalent to an order withdrawing such lands under the second form under said act, and as an order changing to the second form any withdrawal of the first form then effective as to any such tracts."

It is apparent that where lands have been withdrawn from all disposition they cannot be entered at the local land office until the local land officers have received instructions revoking or modifying such withdrawal.

Counsel for Pratt insist that Weatherstone cannot be awarded the land, as the farm unit plats allow the entry of only forty acres. In answer to that contention, it is sufficient to say that according to the farm unit plats on file in your office it appears that farm unit "A" embraces 120 acres, the identical area and subdivisions embraced in the application of Weatherstone.

It appears that Weatherstone's application was allowed, and his entry made of record May 16, 1908, under authority of your said letter "C" of March 17, 1908. As he appears to have been the first legal applicant after the land became subject to entry, his entry will be allowed to stand and the application of Pratt rejected.

The motion for review is denied.

RESIDENCE—MILITARY SERVICE—SECTIONS 2304 AND 2305, R. S.

HERMAN LOGAN.

One who is qualified to make a homestead entry under section 2304 of the Revised Statutes, by reason of having served ninety days in the army, navy, or marine corps, is entitled to credit under section 2305, in lieu of residence, to the full period of his service, provided he has resided upon, cultivated and improved his homestead for at least one year.

Carl McGregor, 37 L. D., 693, overruled.

First Assistant Secretary Pierce to the Commissioner of the General
(W. C. P.) *Land Office, August 17, 1909.* (E. F. B.)

Herman Logan appeals from the decision of your office of January 15, 1909, rejecting the final proof submitted upon his homestead entry of the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 33, N. $\frac{1}{2}$ SE. $\frac{1}{4}$, and SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 32, T. 13 N., R. 20 E., Lewistown, Montana, for the reason that it was prematurely offered. Said ruling was adhered to by your decision of April 6, 1909.

The entry was made April 26, 1906, and final proof was submitted May 8, 1908, two years and thirteen days after the date of entry. Claimant, however, supplemented his proof by his record of service in the army of the United States from the date of his enlistment, February 23, 1903, to the date of his discharge, February 22, 1906.

The proof was rejected as premature under the decision of your office holding that the entryman was only entitled to credit for military service of four months and twenty-three days, commencing from the term of his enlistment to July 15, 1903, the close of the Philippine insurrection.

Error as alleged in not giving claimant credit for the full term of his military service, as authorized by section 2305, Revised Statutes, and in confining him to the time he performed active service during the suppression of the insurrection in the Philippines.

This entry was made under authority of section 2304, Revised Statutes, which provides that "every private soldier and officer who has served in the army of the United States . . . during the suppression of the insurrection in the Philippines for ninety days, and who was or shall be honorably discharged," shall be entitled to enter a quantity of public lands not exceeding one hundred and sixty acres, or one quarter section.

The sole purpose of that section was to fix a qualification for persons making entry under its provisions. The military service must have been performed for a period of at least ninety days "during the recent rebellion" or "during the Spanish War" or "during the suppression of the insurrection in the Philippines." That is an essential requisite to qualification to make entry under said section, but it was not intended to fix the period for which the entryman shall be entitled to credit for military service in lieu of residence. That is provided for by the next section (2305), which declares that:

The time which the homestead settler has served in the Army, Navy, or Marine Corps shall be deducted from the time heretofore required to perfect title, or if discharged on account of wounds received or disability incurred in the line of duty, then the term of enlistment shall be deducted from the time heretofore required to perfect title, without reference to the length of time he may have served; but no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year after he shall have commenced his improvements.

The manifest purpose of that provision was to give to every one qualified to make entry under said section 2304, credit for his entire service in the army from the date of his enlistment to the date of his discharge, irrespective of whether his *active service* "during the recent rebellion" or "during the suppression of the insurrection in the Philippines" covered the entire period of his enlistment or only ninety days. That is made apparent by the provision giving to persons discharged on account of wounds received or disability incurred in line of duty credit for the full term of their enlistment, thus indicating a purpose to fix the term of enlistment as the measure of credit in all cases where the active service performed was sufficient to qualify the person to make entry under the preceding section.

It was not merely by virtue of his enlistment in the army of the United States that Logan was qualified to make entry under said section, but by virtue of his service in the army for a period at least of ninety days during the suppression of the insurrection in the Philippines. His qualification being fixed by reason of such service, and having made entry by virtue thereof, he was entitled to all the provisions of section 2305, Revised Statutes.

In the case of James M. Esterling (36 L. D., 294) the entry was not made under authority of section 2304, Revised Statutes, but under the general provisions of the homestead law contained in section 2289, which does not require active service in the army as a requisite to qualification. After the entry had been made, the entryman enlisted in the army of the United States, January 13, 1903, and was sent to the Philippines in June, 1903, but on account of illness did not join his regiment until December, 1903. He was discharged January 12, 1906, at the end of his term of enlistment.

Your office held that Easterling was only entitled to credit for military service from the date of his enlistment until July 15, 1903, the date when the Philippine insurrection ceased; but the Department overruled your decision, holding that an entryman having enlisted for a fixed term during the war was entitled to credit for constructive residence during his absence occasioned thereby although the war may terminate prior to the term of his enlistment.

That entry was protected by the act of June 16, 1898 (30 Stat., 473), which was passed expressly for the benefit of such settlers. It provides:

That in every case in which a settler on the public land of the United States under the homestead laws enlists or is actually engaged in the Army, Navy, or Marine Corps of the United States as private soldier, officer, seaman, or marine, during the existing War with Spain, or during any other war in which the United States may be engaged, his services therein shall, in the administration of the homestead laws, be construed to be equivalent to all intents and purposes to residence and cultivation for the same length of time upon the tract entered or settled upon.

It was designed to encourage enlistments by allowing absence from the homestead for the full term of the enlistment, without forfeiture of entry initiated before enlistment.

As the right given by section 2304 is only to soldiers whose term of enlistment embraced a period of ninety days during the wars named in said section, it follows that credit can only be given for the term of enlistment during which such service was performed and not for any other enlistment. Hence the reenlistment of the soldier who served for ninety days in such wars cannot be tacked to his former enlistment so as to extend the credit beyond the term of his first enlistment, nor can his credit for service under such enlistment be diminished by reason of close of war or insurrection during such period of actual service.

In McGregor's case (37 L. D., 693) entry was under section 2304 of the Revised Statutes. He enlisted during the insurrection April, 1903 (not November 20, as there stated), and was discharged April 11, 1906. He was held entitled to credit for only that part of his service rendered during the insurrection. Credit for his full term of service was denied because he did not serve actively in the Philippine Islands, it being stated that "while claimant enlisted during the suppression of the Philippine insurrection, it is not shown that he was ever in or near the Philippine Islands, or that he directly aided in the suppression." As he actively served during the insurrection, he was qualified under section 2304 and, on the view here taken, was entitled to full credit for his term of service. The different purposes of the two sections were overlooked, one fixing qualification, the other credit upon residence for the time held in service. The rule stated in that case will not be followed.

As Logan actively served during the insurrection for a time qualifying him under section 2304, he is by section 2305 entitled to credit for his full term of service.

Your decision is reversed.

REPAYMENT—MORTGAGEE—LEGAL REPRESENTATIVE—ACT OF MARCH
26, 1908.

ALEXANDER FRASER.

A mortgagee under a mortgage which is merely a lien on the land is not a "legal representative" within the meaning of the act of March 26, 1908, authorizing repayment of purchase money and commissions to the persons who originally made the payment or their "legal representatives."

First Assistant Secretary Pierce to the Commissioner of the General
(W. C. P.) *Land Office, August 17, 1909.* (O. W. L.)

Alexander Fraser, by his attorney, W. H. Smallwood, has appealed from your decision of June 11, 1909, denying his application for re-

payment of money paid by Alexander Green on preemption cash entry No. 6966, made at Duluth, Minnesota.

The records of your office show that the entry was held for cancellation December 28, 1885, for the reason that the proof showed that the entryman had failed to reside on the land for six months continuously prior to the date of entry, and was finally canceled for the above reason, September 17, 1886.

By mortgage executed February 29, 1884, the date of entry, Green mortgaged the land to Fraser in the sum of \$275, to secure a promissory note for that amount, payable in six months, with interest at ten per cent. The mortgage also authorized the mortgagee, in case of default, to sell the land at public auction, and from the proceeds retain the principal and interest, also the sum of \$50 as attorney fees. It also provided that the mortgagee should receive \$50 attorney fees in case of foreclosure of the mortgage. No proceedings have ever been had under the authority to sell the land, nor has there been any foreclosure of the mortgage.

The act of June 16, 1880 (21 Stat., 287), authorizes, in section 2, the repayment of money expended on entries erroneously allowed, to the person who made the entry, or to his heirs or assigns.

Section 3334, Revised Laws of Minnesota, 1905, construing the word "conveyance," states that it shall include every instrument in writing whereby any interest in real estate is created, aliened, mortgaged or assigned, thus recognizing the distinction between an assignee and a mortgagee. Section 4441 provides that a mortgage on real property is not to be deemed a conveyance, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure. In other words, under the laws of Minnesota a mortgagee is simply a creditor whose debt is secured by means of a lien on the land. Under a similar state of the law in the State of California, a mortgagee was held not to be an assignee within the meaning of the above act for the repayment of moneys. (See California Loan and Trust Company, 24 L. D., 246.)

It is apparent therefore that the applicant is not entitled to repayment under the act of June 16, 1880.

The act of March 26, 1908 (35 Stat., 48), authorized the repayment of money where the application for entry, or proof, has been rejected, and there is no fraud in connection with the application, to the person who made such application for entry, or proof, or to his legal representatives. The instructions of April 29, 1908 (36 L. D., 388), recognized heirs, executors and administrators as legal representatives under this act.

It is not necessary to decide here whether a purchaser of the land before cancellation be a legal representative or not. It is clear that the mortgagee, simply having a lien upon the land for the payment of

a debt, is not a legal representative, who certainly must be a party succeeding to all the rights of the entryman. Your decision is therefore affirmed.

HOMESTEAD ENTRY—QUALIFICATIONS—OWNERSHIP OF LAND.

GALLANT *v.* COLE.

One who holds land under an unperfected desert-land entry is not the proprietor thereof within the meaning of the statute holding disqualified to make homestead entry one who is the proprietor of more than 160 acres of land. A transfer of land by one owning more than 160 acres, for the purpose of qualifying himself to make a homestead entry, is not a violation of law, provided the transfer is final and made in good faith.

First Assistant Secretary Pierce to the Commissioner of the General
(W. C. P.) *Land Office, August 17, 1909.* (O. W. L.)

John W. Gallant has appealed from your decision of April 28, 1909, affirming the action of the register and receiver and dismissing his contest affidavit filed against homestead entry No. 781, Ute series, made November 1, 1905, by John E. Cole, at Montrose, Colorado, for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and lot 7, Sec. 6, T. 15 S., R. 95 W., and S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 1, T. 15 S., R. 96 W., 6th P. M.

The affidavit of contest, which was filed April 23, 1907, alleged that Cole was disqualified to make homestead entry because he was the proprietor of more than 160 acres of land.

It appears that Cole had held the land embraced in his homestead entry for several years prior thereto under a preemption entry and desert land entry, and, according to his testimony, had expended about three thousand dollars in the improvement thereof prior to making homestead entry. He had been notified by your office that his desert land entry would be canceled upon failure to make final proof of the reclamation of the land. Cole, on October 30, 1905, went to the office of Milton R. Welch, the United States Commissioner, for the purpose of making a homestead entry for the land as he was unable to fulfill the requirements of the desert land law. The United States Commissioner showed him the homestead affidavit. Cole, at that time, owned 200 acres of land in private ownership and was the assignee to the extent of 80 acres of unperfected desert land entries. Cole noticed in the affidavit the requirement that he must swear that he was not the owner of more than 160 acres of land. The United States Commissioner thereupon informed him that he was disqualified. Cole thereupon stated that his son, W. S. Cole, then about twenty-eight years of age, had worked for him since attaining majority without

obtaining any compensation, and that he would just give his son 40 acres of land. The Commissioner advised him that the 80 acres which he held as assignee under the desert land law would not be considered in computing his qualifications. The United States Commissioner thereupon drew up a deed by which the father conveyed 40 acres to his son, the deed stating a consideration of four hundred dollars and being subject to a mortgage the payment of which, however, the father assumed. The deed which was executed in the morning was then left by the father with the Commissioner, with instructions to file the same of record. In the afternoon, Cole executed the homestead affidavit and the deed was filed for record the following day. After record, it was returned to the father who retained the same with his other papers. It appears that the son had no knowledge of the conveyance until about three months prior to the filing of the contest affidavit. In March, 1907, the taxes, which for the years 1906 and 1907 had been assessed to the son, were paid by W. S. Cole. The father testifies that he had previously to executing the deed told the son to stick to him and he would make it all right.

It is first contended that the deed from father to son is invalid, for the reason that it was never delivered to the son. The weight of authority appears to be that a delivery to the recorder of a deed, beneficial to the grantee without the grantee's knowledge, is a valid delivery. Section 694, Revised Statutes of Colorado, 1908, provides that,

All deeds may be recorded in the office of the recorder of the county wherein such real estate is situate, and from and after the filing thereof for record in such office and not before, such deeds, bonds and agreements in writing shall take effect as to subsequent *bona fide* purchasers and encumbrancers by mortgage, judgment or otherwise not having notice thereof.

In Devlin on Deeds, Section 291 of the Second Edition, the rule is laid down as follows:

In other words, it may be said that the delivery is valid when it appears that a deed was placed on record, with the intent that it should pass the title to the grantee although never actually delivered to the grantee.

Under the above, it is apparent that the delivery of the deed to the United States Commissioner and its subsequent recording was a valid delivery.

It is next urged that the deed was not made in good faith but was a mere fraudulent device for evading the entryman's disqualification.

The question of the validity of a conveyance made for the purpose of qualifying an individual to make a homestead entry has been before the Department several times, and the validity thereof must naturally be determined by the facts and circumstances concerning each particular case.

In the case of *Leitch v. Moen* (18 L. D., 397), it was held that a fraudulent deed, purporting to convey a tract from the homesteader to his son, will not operate to relieve the entryman from the statutory disqualification. The deed in that case purported to convey a fee simple title reserving a life estate to the father and his wife. The deed was not recorded, the grantor still retaining possession of the land and later, in several instruments, still claimed to be owner thereof.

In *Mason v. Cromwell* (24 L. D., 248), the entryman, for the purpose of qualifying himself, executed a deed transferring the land to his sister. He thereupon sent the deed to an unknown person with instructions that it be forwarded to his wife. The deed was not recorded until long after the affidavit of contest had been filed, and the entryman thereafter had for a considerable time the power of recalling the deed. The sister was in that case employed simply "as an unconscious beneficiary for the express purpose of qualifying Mason to make entry."

In *Heath v. Dotson* (27 L. D., 546) it is held that a transfer of land in order to enable the claimant to make the oath required of homestead applicants, is not a violation of the acts of May 2, 1890, or March 3, 1891, provided the sale is final and made in good faith.

In *Auker v. Young* (37 L. D., 176) it was held to be a mere collusive device to evade the law, the facts being that the entryman owned about 1800 acres of land at the time of making entry. Shortly prior to making the homestead entry, the entryman had acknowledged a deed conveying nearly all his land to his wife. This deed was never recorded and subsequent to its execution he executed mortgages of the land so conveyed, and in other ways held himself out to be the owner thereof.

In the present case it is apparent that the motive of making the gift at the particular time it was made was to qualify the entryman. The deed, however, was immediately recorded and, from all the testimony, I am convinced that the gift was in good faith and final. The case is, therefore, analogous to that of *Heath v. Dotson*, *supra*.

It is next contended that, assuming that the deed conveyed 40 acres to the son, the entryman was still disqualified by reason of the 80 acres held as assignee under the desert land law. In support of this it is contended that a desert entry is a contract between the entryman and the Government by which the land is paid for in partial instalments, and that the Department has held that one who holds land under a contract of purchase under which all payments had not yet been made, is disqualified, citing *Smith v. Longpre* (32 L. D., 226) and *Jacob J. Rehart* (35 L. D., 615). In *Smith v. Longpre*, the contract for purchase was between the entryman and the

Union Pacific Railroad Company, who held the land purchased in private ownership. In the case of Jacob J. Rehart, the contract was between the entryman and the State of California which had selected the land so purchased, the homestead entry, however, being made prior to the approval of the selection by this Department. The only thing to be done in the case of the state selection was that this Department ascertain whether the base offered by the state for its selection was valid.

The above two cases are essentially different from that of land held under desert land entry in which, in addition to the payments which are required to be made, the entryman must submit proof of the reclamation, cultivation and requisite expenditure. *Childs v. Ayerst et al.* (19 L. D., 96) held that the possession of a quarter section of land under an unperfected timber culture entry did not disqualify a homestead applicant. Although the desert land entryman may have an inchoate right in the land, he does not acquire any equitable title until final proof and payment have been made.

It is urged that the instructions of July 14, 1905 (34 L. D., 29), recognize the holder of an unperfected desert land entry as the proprietor thereof. These instructions related to the provisions of the act of June 17, 1902 (32 Stat., 388), relative to the furnishing of water to lands held in private ownership within an irrigation project. It was stated therein:

While such entrymen or assignees are not invested with a legal title, they have such an equitable *right and interest* in the land as to constitute them proprietors within the spirit and purpose of the act of June 17, 1902, and the right to the use of water may be granted to such proprietors.

This was by no means a holding that a desert land entryman is a proprietor of land within the meaning of the term as used in section 5 of the act of March 3, 1891 (26 Stat., 1095). It simply held that the spirit of the act of June 17, 1902, permitted the Government to furnish water to others than homestead entrymen who had a claim to land under the public land laws within an irrigation project.

Your decision is, therefore, affirmed.

HEIRS OF DEWOLF *v.* MOORE.

Petition for re-review of departmental decision of August 10, 1908, 37 L. D., 110, 723, denied by First Assistant Secretary Pierce August 19, 1909.

DESERT LAND ENTRY—EXPENDITURES—STOCK IN IRRIGATING COMPANIES.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., August 21, 1909.

REGISTERS AND RECEIVERS,

United States Land Offices.

SIRS: That portion of section 18 of the regulations governing entries and proofs under the desert-land laws, approved November 30, 1908 (37 L. D., 312), which relates to expenditures for stock or interest in irrigating companies, is hereby amended to read as follows:

Expenditures for stock or interest in an irrigating company through which water is to be secured for irrigating the land and which owns the right to the use of sufficient water to satisfy all valid claims therefor acquired by ownership of its stock or otherwise, will be accepted as satisfactory expenditures when claimant shall file and make a part of the annual proof:

(a) A receipt or other writing signed by the proper officer or agent of the company showing payment in cash for stock or interest in the company, and the affidavit of the claimant showing that the payment was made in cash and when made.

(b) An affidavit of the claimant showing the nature of the contract or agreement he had with the company entitling him to the use of water, and the quantity of water to which he is entitled under such contract or agreement, or proper showing that the ownership of the stock or interest entitles him to the use of water and the quantity of water to which he is entitled by virtue of such ownership.

(c) A statement, under oath, of the proper officer of the company, showing the right of the company to the use of water; whether such right is based upon a decree, or decrees, of court, or upon appropriations or filings made in conformity to state or territorial laws; the source or sources of its water supply; the quantity of water owned or appropriated by it; the total quantity of water which it is under contract or agreement to deliver to its patrons and stockholders, and the date when, no unforeseen obstacle preventing, it will be able to deliver water on the land of the entry, which land must be described in the sworn statement.

Very respectfully,

S. V. PROUDFIT,
Acting Commissioner.

Approved:

FRANK PIERCE,
Acting Secretary.

OPENING CHEYENNE RIVER AND STANDING ROCK LANDS.

BY THE PRESIDENT OF THE UNITED STATES.

A PROCLAMATION.

I, WILLIAM H. TAFT, President of the United States of America, by virtue of the power and authority vested in me by the act of

Congress approved May 29, 1908 (35 Stat., 460), do hereby prescribe, proclaim and make known that all the nonmineral, unallotted unreserved lands within the Cheyenne River and Standing Rock Indian Reservations in the States of South Dakota and North Dakota which have been or may be classified under said act of Congress into agricultural land of the first class, agricultural land of the second class, grazing land and timber land shall be disposed of under the general provisions of the homestead laws of the United States and of said act of Congress, and be opened to settlement and entry, and be settled upon, occupied and entered in the following manner, and not otherwise:

1. All persons qualified to make a homestead entry may, on and after October 4, 1909, but not theretofore, and prior to and including October 23, 1909, but not thereafter, present to James W. Witten, Superintendent of the Opening, at the City of Aberdeen, South Dakota, by ordinary mail, but not in person or by registered mail or otherwise, sealed envelopes containing their applications for registration, but no envelope must contain more than one application; and no person can present more than one application in his own behalf and one as agent for a soldier, sailor, widow or minor orphan child, as hereinafter provided.

2. All applications for registration must show the applicant's name, postoffice address, age, height and weight, and be sworn to by them at either Aberdeen, LeBeau, Lemmon, Mobridge or Pierre, South Dakota, or at Bismarck, North Dakota, before some notary public designated by the Superintendent.

3. Persons who were honorably discharged after ninety days' service in the Army or Navy of the United States, during the War of the Rebellion, the Spanish-American War, or the Philippine Insurrection, or their widows or minor orphan children, may make their applications for registration, either in person or through their duly appointed agents, but no person can act as agent for more than one such applicant, and all applications presented by agents must be signed, sworn to and presented by them at one of the places named and in the same manner in which other applicants are required to swear to and present their applications.

4. Beginning at ten o'clock a. m. on October 26, 1909, at the said City of Aberdeen, and continuing thereafter from day to day, Sundays excepted, as long as may be necessary, there shall be impartially taken and selected indiscriminately from the whole number of envelopes so presented such number thereof as may be necessary to carry into effect the provisions of this Proclamation, and the applications for registration contained in the envelopes so selected shall, when correct in form and execution, be numbered serially in the order in which they are selected, beginning with number one, and

the numbers thus assigned shall fix and control the order in which the persons named therein may make entry after the lands shall become subject to entry.

5. A list of the successful applicants, showing the number assigned to each of them, will be conspicuously posted and furnished to the press for publication as a matter of news, and a proper notice will be promptly mailed to each person to whom a number is assigned.

6. Beginning at nine o'clock a. m. on April 1, 1910, and continuing thereafter on such dates as may be fixed by the Secretary of the Interior, persons holding numbers assigned to them under this Proclamation will be permitted to present their applications to enter (or file their declaratory statements in cases where they are entitled to file declaratory statements) at the land office for any land district in which their numbers entitle them to make entry, in the order in which their applications for registration were selected and numbered, but no person can present more than one application to enter or file more than one declaratory statement.

7. If any person fails to apply to enter (or to file a declaratory statement if he is entitled to do so) on the day assigned him for that purpose, or if he presents more than one application for registration or presents an application in any other than his true name, he will forfeit his right to make entry or filing under this Proclamation.

8. None of the lands opened to entry under this Proclamation shall become subject to settlement or entry prior to the first day of September, 1910, except in the manner prescribed herein; and all persons are admonished not to make any settlement prior to that date on lands not covered by entries or filings made by them under this Proclamation. On September 1, 1910, all of said lands which have not then been entered under this Proclamation will become subject to settlement and entry under the general provisions of the homestead laws and the said act of Congress.

9. The Secretary of the Interior shall make and prescribe such rules and regulations as may be necessary and proper to carry this Proclamation and the said act of Congress into full force and effect.

In Witness Whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 19th day of August, in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States the one hundred and thirty-fourth.

By the President:

WM. H. TAFT.

ALVEY A. ADEE,

Acting Secretary of State.

[SEAL.]

OPENING CHEYENNE RIVER AND STANDING ROCK LANDS.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 21, 1909.

JAMES W. WITTEN,

Superintendent of Opening and Sale of Indian Lands.

SIR: Pursuant to the Proclamation of the President issued August 19, 1909, for the opening of the classified lands within the Cheyenne River and Standing Rock Indian Reservations, the following rules and regulations are hereby prescribed:

1. *Applications for registration* and powers of attorney for the appointment of agents by soldiers or sailors or their widows or minor orphan children must be made on blank forms prescribed by the Superintendent.

2. No notary public shall be designated for the purpose of administering oaths to applicants for registration who was not appointed prior to July 1, 1909, and on that date a resident of the county in which he shall act, and the Superintendent is hereby authorized and directed to prescribe such plans, rules and regulations governing the action of such notaries public, in relation to the registration, as may in his judgment be necessary.

3. *Envelopes used in presenting applications* for registration should be three and one-half inches wide and six inches long, and they must all be plainly addressed to "James W. Witten, Superintendent, Aberdeen, South Dakota," and the words "Registration Application" must be plainly written or printed across the front and at the left end of the envelope.

4. Blank forms of application for registration and addressed envelopes to be used in forwarding applications to the Superintendent will be furnished to each applicant by the Superintendent, through the notaries public before whom the applicants are sworn. Blank powers of attorney to be used by soldiers or sailors, or their widows or minor orphan children, in the appointment of agents, may be obtained from the Superintendent at Washington, D. C., prior to September 25, 1909, and after that date from him at Aberdeen, South Dakota.

5. No envelope should contain more than one application for registration or contain any other paper than the application. Proof of naturalization and of military service, and other proof required (as in case of second homestead entries), will be exacted before the entry is allowed, but should not accompany the application for registration.

6. *Method of receiving and handling applications.*—As soon as the Superintendent of the Opening receives an envelop addressed to him, with the words "Registration Application" endorsed thereon, he will

(if such envelope bears no distinctive marks or words indicating the name of the person by whom it was presented) deposit it in a metal can set apart for the reception of such envelopes. The cans used for this purpose must be so constructed as to prevent envelopes deposited therein from being removed therefrom, without detection, and they must be safely guarded by representatives of the Government until they are publicly opened on the day when the selections authorized by the Proclamation are to be made. All envelopes which show the name of the person by whom they were mailed will be opened as soon as they are received by the Superintendent, and the applications therein will be returned to the applicants.

7. *Method of assigning numbers to applicants.*—On October 26, 1909, the cans containing the applications for registration will be publicly opened and all envelopes contained therein will be thoroughly mixed and distributed preparatory to the selection and numbering thereof in the manner directed by said Proclamation.

8. Numbers will not be assigned to a greater number of persons than will be reasonably necessary to induce the entry of all the lands subject to entry in said reservations under said Proclamation. The applications for registration presented by persons to whom numbers are not assigned will be carefully arranged and inspected, and if it is found that any person has presented more than one application for registration in his own behalf and one application as agent, or presented his own application in any other than his true name, or in any other manner than that directed by said Proclamation, he will be denied the right to make entry under any number assigned him.

9. When an application for registration has been selected and numbered, as prescribed by said Proclamation, the name and address of the applicant and the number assigned to him will be publicly announced, and the application will be filed in the order in which it was numbered.

10. All selected applications which are not correct in form and execution will be stamped "Rejected—Imperfectly Executed," and filed in the order in which they were rejected.

11. *Notices of numbers assigned* will be promptly mailed to all persons to whom they are assigned, and to the agents, in cases where numbers are assigned to soldiers who registered by agents, at the post-office address given in their applications for registration, but no notice whatever will be sent to persons to whom numbers are not assigned.

12. *Notices of the time and place of making entry* will be mailed to such number of persons holding numbers as may be reasonably necessary to induce the entering of all the lands desirable for entry, and if any person who receives such a notice either notifies the Su-

perintendent that he does not intend to make entry, or fails to make entry on the day assigned him for that purpose, the person holding the lowest number to whom no date for entry has been assigned will be at once notified that he will be permitted to make entry on a date named in such notice, after all persons holding numbers lower than his have had opportunity to make entry.

13. *Time and method of making entries and filings.*—Persons who receive notice of their right to make entry must file or present their applications to enter at the land office for the land district in which the lands they desire are located, as follows: The applications of persons holding numbers from 1 to 50 inclusive must be presented when their names are called on April 1, 1910; the applications of persons holding numbers from 51 to 100 inclusive must be presented when their names are called on April 2, 1910; the applications of persons holding numbers 101 to 200 inclusive must be presented when their names are called on April 4, 1910; and so on, at the rate of one hundred on each succeeding day, Sundays and legal holidays excepted, until the persons holding the first one thousand numbers have been given opportunity to present their applications, and after that the applications of persons holding numbers above one thousand may be similarly presented at the rate of one hundred and fifty daily. All entries must, as far as possible, embrace only lands listed and appraised as one tract, and no applicant will be permitted to omit any unentered part of a listed tract from his application and include therein, in lieu of the omitted tract, a part of another or different listed tract; but where a listed tract embraces less than a quarter section it and a part of another and different listed tract may be embraced in the same entry. In cases where an applicant desires to enter less than a quarter section, he may apply for any legal subdivision, or subdivisions, of a listed tract, and where a part of a listed tract has been entered the remaining part and a part of another adjacent listed tract may be embraced in the same entry.

14. If any person who has been assigned a number entitling him to make entry fails to appear and present his application when the number assigned him is reached and his name is called, his right to enter will be passed until after all other applicants assigned for that day have been disposed of, when he will be afforded another opportunity to make entry on that day, failing in which he will be deemed to have abandoned his right to make entry prior to September 1, 1910.

15. If any person holding a number dies before the date on which he is required to make entry, his widow, or any one of his heirs, may appear and make entry, in their own individual right, under his number on that date, but not thereafter.

16. *Proof required at time of filing.*—At the time of appearing to make entry, each applicant must, by affidavit, show his qualifications

to make a homestead entry. If an applicant files a soldier's declaratory statement, either in person or by agent, he must furnish evidence of military service and honorable discharge. All foreign-born persons must furnish either the original or copies of their declaration of intention to become citizens or copies of the order of the court admitting them to full citizenship. If persons who were not born in the United States claim citizenship through their fathers' naturalization while they were under twenty-one years of age, they must furnish a copy of the order of the court admitting their fathers to full citizenship.

17. Applicants will not be required to swear that they have seen or examined the land, before making application to enter, and the usual nonmineral and nonsaline affidavits will not be required with applications to enter made prior to September 1, 1910, but evidence of the nonmineral and nonsaline character of the lands entered before that date must be furnished by the entrymen before their final proofs are accepted.

18. *Proceedings on contests and rejected applications.*—When the Register and Receiver of the land office at which these lands will become subject to entry for any reason reject the application of any person claiming the right to make entry, under any number assigned him, they will at once advise him of the rejection and of his right of appeal, and further action thereon shall be controlled by the following rules, and not otherwise:

a. Applications either to file soldiers' declaratory statement or to make homestead entry of these lands must, on presentation in accordance with these regulations, be at once accepted or rejected, but the local land officers may, in their discretion, permit amendment of defective applications during the day only on which they are presented. If properly amended on the same day entry may be permitted after the numbers for the day have been exhausted, in their numerical order.

b. No appeal to the General Land Office will be allowed or considered unless taken within one day (Sundays excepted) after the rejection of the application.

c. After the rejection of an application, whether an appeal be taken or not, the land will continue to be subject to entry as before, excepting that any subsequent applicant for the same land must be informed of the prior rejected application and that his application, if allowed, will be subject to the disposition of the prior application, upon appeal if any be taken from the rejection thereof, which fact must be noted upon the receipt issued him and upon the application allowed.

d. When an appeal is taken the papers will be immediately forwarded to the General Land Office, where they will at once be care-

fully examined and forwarded to the Secretary of the Interior with appropriate recommendation, when the matter will be promptly decided and closed.

e. Applications filed prior to September 1, 1910, to contest entries allowed for these lands will also be immediately forwarded to the General Land Office, where they will be at once carefully examined and forwarded to the Secretary of the Interior, with proper recommendations, when the matter will be promptly decided.

f. These regulations will supersede, during the period between April 1, 1910, and September 1, 1910, any Rule of Practice or other regulation governing the disposition of applications with which they may be in conflict, in so far as they relate to the lands affected by these regulations, and will apply to all appeals taken from actions of local officers during that period affecting any of these lands.

Very respectfully,

S. V. PROUDFIT,
Acting Commissioner.

Approved August 21, 1909.

FRANK PIERCE,
Acting Secretary.

SOLDIERS ADDITIONAL—HONORABLE DISCHARGE—SECTIONS 2304 AND 2307, R. S.

CLARKE I. WYMAN.

An enlisted man who was discharged by reason of reenlistment, and subsequently deserted, was not "honorably discharged" within the meaning of section 2304 of the Revised Statutes, and no rights under section 2307 can be predicated upon his service.

First Assistant Secretary Pierce to the Commissioner of the General
(W. C. P.) *Land Office, August 24, 1909.* (J. H. T.)

May 12, 1909, the Department affirmed the decision of your office of February 16, 1909, rejecting the application of Clarke I. Wyman, under section 2307, R. S., as assignee of Emily G. Holliday, widow of David Holliday, to enter lots 1 and 2, Sec. 7, T. 160 N., R. 80 W., Devils Lake, North Dakota.

Said application was based upon the original homestead entry made by Holliday June 1, 1868, for 80 acres, and his military service during the Civil War from October, 1861, to serve three years, to his discharge December 24, 1863, "by reason of reenlistment as a veteran volunteer in the same organization, to serve three years."

After the reenlistment, Holliday deserted and did not receive an honorable discharge from said service. It is insisted, however, that he should be credited with the service performed by him up to the time he was discharged for the purpose of reenlistment. The De-

partment held that his discharge on December 24, 1863, for the purpose of reenlistment was not an honorable discharge separating him from the service, and therefore that he had never been honorably discharged within the meaning of the land laws.

In the motion for review it is requested that the War Department be called upon for a report and statement as to whether the said discharge at the time of reenlistment was not an honorable discharge and that this Department should follow the decision of the War Department in that matter.

In the case of David H. Dyer (9 P. D., 87) it was held:

This Department is bound to accept as true the unimpeached record of the War Department, but it alone has power to determine what effect such record shall have on a claimant's pensionable rights.

In the case of Mary Landfrit (8 P. D., 530) it was held:

A discharge of an enlisted man by reason of his promotion to a higher rank (lieutenant) is not a discharge within the meaning of the act of June 27, 1890, the purpose of said discharge is not to terminate his service but to retain him in the service in a higher grade, and when such soldier was, after his promotion, dismissed from the service by sentence of a court-martial he can not be held to have been honorably discharged.

The above decisions are in harmony with the uniform rulings of this Department in land cases. Holliday cannot be considered as having been honorably discharged from service in the War of the Rebellion, and, therefore, the application to make additional homestead entry, based upon his said service, cannot be allowed. The motion for review is accordingly denied.

STATE SELECTION—RELINQUISHMENT OF SETTLEMENT CLAIM.

TODD *v.* STATE OF WASHINGTON.

Where a settlement claim antedating a selection by the State of Washington under the act of March 3, 1893, and held in departmental decision of September 20, 1907 (36 L. D., 89), to be superior to the claim of the State, was subsequently relinquished while the State's claim under its selection was still subsisting and pending before the land department, the right of the State under its selection immediately attached.

The purpose of the proviso to the act of 1893 was to protect *bona fide* settlers, and it was not intended to provide a means whereby a settlement claim might be presented merely to defeat the right of the State to select, and afterwards relinquished and entry for the same land made under the timber and stone law.

First Assistant Secretary Pierce to the Commissioner of the General
(W. C. P.) *Land office, August 26, 1909.* (S. W. W.)

This is the appeal of Edward H. Todd from your office decision of April 27, 1909, denying his motion for review of that portion of

your previous decision of June 26, 1908, which held that the State of Washington should be allowed to select the SE. $\frac{1}{4}$ of Sec. 34, T. 25 N., R. 12 W., Seattle, Washington, land district.

The material facts necessary to the proper consideration of this matter may be briefly stated as follows:

The township was surveyed, July 13 to September 2, 1903. The survey was approved December 29, 1904, and the plat filed in the local office July 13, 1905.

September 9, 1905, the State of Washington filed its list No. 23, of school indemnity selections, embracing nearly all of the land in the township, including the tract involved herein. However, previous to the filing of the State's list, a number of homestead applications had been filed by settlers claiming *bona fide* settlements prior to the date of filing of the plat, among which was that of Joseph T. Barkley, who was allowed, on August 8, 1905, to make homestead entry No. 19165 for said tract.

Barkley's case, and a number of others, were involved in the case entitled Homestead and Timber Land Claims *v.* State of Washington, which was considered by your office December 17, 1906, and by the Department, on appeal, September 20, 1907 (36 L. D., 89), in both of which decisions the State's claim was held to be inferior to that of Barkley.

The Department's decision of September 20, 1907, was promulgated by your office October 11, following, and the State, presumably in acquiescence with the said decision, filed relinquishments of certain of its selections contained in said list No. 23, embracing chiefly tracts to which prior claims had been asserted, but did not include the tract involved herein.

Barkley's entry was canceled on relinquishment February 14, 1908, and on March 19, following, Todd, the appellant herein, filed timber and stone application for the tract of land involved, upon which proof was submitted June 10, 1908, on which date cash receipt was issued, but final certificate withheld by the register, for the reason that the proof was suspended because of conflict with the State selection. Accordingly, when your office, on June 26, 1908, returned the State's list for allowance as to certain tracts to which its claim had been found superior by the Department, it was held that the State would be permitted to perfect its application to the tract relinquished by Barkley, upon payment of fees, and the State application was allowed October 12, 1908.

Your office decision under consideration holds that by the act of March 3, 1893 (27 Stat., 593), the State of Washington was granted a preference right of selection for a period of sixty days after survey; that such preference right could be defeated only by a *bona fide* settlement claim; that had Barkley chosen to do so, he could have per-

fecting his entry as against the claim of the State, but when he relinquished his claim all right by virtue of his alleged prior settlement was waived, and the force of such alleged settlement extinguished and lost; that the State's claim, duly asserted through application, was subsisting and of full validity at the date of the filing of Barkley's relinquishment, and upon such relinquishment there was nothing to prevent the State's claim from attaching.

Your office decision further holds that Todd's application was improperly allowed, for the reason that while the State's application was pending the land was not subject to any other disposition, under the rule contained in the regulations of July 14, 1899 (29 L. D., 29).

The appeal contains a number of specifications of error, the most important being that the regulations above mentioned do not apply in a case of this sort, and that after the Department had rendered a decision in the case holding that the State's claim should be rejected, your office was without jurisdiction to take any other action whatever, the cases of Troy's Heirs *v.* Southern Pacific Railroad Company (2 L. D., 523), and John Woods (10 L. D., 230), being cited in support of the contention.

Counsel for appellant submit that the case at bar is exactly analogous to a supposed contest by A. against the entry of B., where the contest is dismissed by the local office, your office and the Department, and A., the contestant, is notified that he has a right to a motion for review within thirty days; after one hundred and seventeen days elapse, no motion for review is filed, whereupon B. relinquishes his entry, and a third party, C., makes entry. Counsel submit that A. has no rights whatever which would prevent C. from entering the land, and maintain that the supposed case differs in no respect whatever from the case under consideration.

The act of March 3, 1893, *supra*, was intended to give the States named therein preference right of selection in satisfying the grants made to the States, for a period of sixty days following the filing of the plats of survey, and the proviso contained in said act was intended to protect only *bona fide* settlers who had located upon the land prior to the filing of the township plats.

When this case was originally before your office and the Department, upon the record as it then stood there was but one thing for the Department to do, and that was to hold that the settlement claim of Barkley defeated the right of the State to select the land. At the same time, however, the right of the State to attack that settlement claim upon the ground that it was not a *bona fide* settlement claim initiated prior to survey, was not denied the State.

Presumably in part acquiescence in the Department's decision, the State relinquished a number of tracts which it had selected, and which were embraced in claims based upon prior settlement, but did

not relinquish the tract involved herein; and before the case was finally closed by the order of your office, Barkley abandoned his homestead claim and filed his relinquishment as evidence thereof. At that time the State's claim had not been finally disposed of, and the only obstacle to the State's selection had been removed. Had the homestead entry been relinquished at the time the case was first considered by the Department, there can be no question that the State's claim would have been ordered allowed; and as the homestead claim had been relinquished when your office undertook to finally close the case, it was proper to order the allowance of the State's claim. As above stated, the act of 1893 was passed for the purpose of enabling the State to satisfy its grants of public land, and the proviso was intended to protect *bona fide* settlers, and was not intended to afford a means whereby a settlement claim might be presented merely to defeat the right of the State to select, and afterwards relinquished and the entry made under the timber and stone law.

The supposed case suggested by counsel is in no way analogous to the case under consideration. In that case the contestant never acquired a preference right. He wholly failed to prosecute his contest. In this case, the State had a preference right granted by statute, which could be defeated only by a *bona fide* settlement claim, and it was not necessary for the State to take any positive action whatever in order to acquire the preference right.

The cases cited by counsel as to the right of your office to take any action other than that indicated by the Department would not seem to be in point, because your office took no action whatever whereby Barkley was induced to relinquish his homestead, and the decision of the Department was to the effect only that the State could not select the land in the face of Barkley's homestead based upon alleged prior settlement.

On the contrary, the case of *Troy's Heirs v. Southern Pacific Railroad Company*, relied upon by counsel, is rather authority for the action taken by your office in this case. In that case the Department held plainly that a party to a suit, although the judgment is against him, has a standing in the case and a right to be heard until it is finally closed. This case was not finally closed at the time Barkley relinquished his entry, and immediately upon that relinquishment the State had a right to an allowance of its selection.

While the other cases cited by counsel, to the effect that upon the expiration of the time allowed for the filing of a motion for review the decision becomes final and the land subject to entry, appear to be in point, it will be observed that the effect of those decisions was changed by the regulations of July 14, 1899, *supra*. It was the pur-

pose of those regulations to provide a uniform method by which lands once segregated should again become subject to entry and selection. It is true that the State's claim in this case was not allowed when first presented, because at that time the land was embraced in Barkley's entry; but the State had appealed from the action of the local office rejecting its application to select, and while the action below had been affirmed, judgment had not been finally executed, and until the case was closed the land was not subject to any other disposition, notwithstanding Barkley's relinquishment.

From these considerations it follows that your office decision was correct and must be affirmed.

PRACTICE—REPAYMENT—MINERAL SURVEY—ACT OF FEBRUARY 24, 1909.

PETER N. HANSON.

In all cases of appeals from inferior tribunals over which the General Land Office exercises supervision, a decision should be rendered by that office before the matter is transmitted to the Department.

The act of February 24, 1909, authorizing repayment of any excess of amounts deposited for the survey of mining claims, contemplates that an account shall be stated in every case where application for repayment is made, and if it appear that there is any excess in the amount deposited, over and above the actual cost of the work performed and the expenses incident thereto, it should be stated and certified from the best data and information obtainable.

First Assistant Secretary Pierce to the Commissioner of the General
(W. C. P.) *Land Office, August 26, 1909.* (E. F. B.)

With your letter of July 31, 1909, you transmit the appeal of Peter N. Hanson from the action of the surveyor-general of South Dakota, rejecting his application for return to him of the excess or unused deposit for work in the office of the surveyor-general upon the survey of the Dump Lode, survey No. 1760.

You transmit said appeal without deciding the question or expressing any opinion thereon because the practice of transmitting an appeal from the surveyor-general direct to the Department was recognized in the case of Golden Empire Mining Company (36 L. D., 561), where the action of the surveyor-general is based upon specific instructions by your office. It does not appear that specific instructions were given in this particular case, as in the case cited, but the instructions from your office upon which the surveyor-general's decision was based are the general instructions to the surveyor-general for his guidance in passing upon all applications for the return of

excess deposits—deposits for mineral surveys—under the act of February 24, 1909 (35 Stat., 645).

That practice is objectionable and should not be followed hereafter. In all cases of appeals from inferior tribunals over which your office exercises supervision, a decision should be rendered by your office whatever direction may previously have been given to the local officers. Such decision may render appeal to the Department unnecessary.

The letters of the surveyor-general transmitted with the record show that on May 20, 1903, appellant deposited in the office of the surveyor-general \$30 for the survey of the Dump Lode, and that an order for survey was issued to United States Mineral Surveyor H. S. Vincent (survey No. 1760), which was made June 12, 1903, and returned to your office June 22, 1903. It was approved July 17 thereafter and the plats and field notes of said survey were received by appellant.

The act of February 24, 1909, authorized the Secretary of the Treasury to pay out of the money covered into the Treasury from deposits made by individuals to cover the cost of work performed and to be performed in the offices of the United States Surveyors-General in connection with the survey of mineral lands—

any excess in the amount deposited over and above the actual cost of the work performed, including all expenses incident thereto for which the deposits were severally made or the whole of any unused deposit.

Such repayment is to be made upon an account certified by the surveyor-general and approved by the Commissioner of the General Land Office.

In the letter of your office of May 26, 1909, to the surveyor-general relative to the approval of claims for repayment under said act, he was instructed as follows:

United States Surveyors-General should not approve any claims for repayment under the act of February 24, 1909, in cases where the entire work in connection with the survey was performed in their offices, unless their records accurately show the "actual cost" of the work in connection therewith to be less than the amount of the deposit therefor, taking into consideration not only the time of the employees of their offices on the work, but the cost of stationery and supplies as well as the time of the surveyor-general himself, the rental of the office, and all other matters which go to make up the "actual cost" of the work; and where the records in the past show that the work was performed, but do not show accurately the "actual cost" thereof, the entire deposit should be treated as earned, and no claim for repayment approved.

Following those instructions the surveyor-general in his instructions of June 4, 1909, states that "as no accounts have ever been kept showing the cost of office work on mining surveys, it will be impossible for this office to render any statement of 'actual cost' of such work." He then assumes that the entire amount of the deposit was earned, as the survey was approved July 17, 1903, because

"the records of this [his] office fail to disclose any excess fees deposited by Mr. Hanson."

That ruling is in strict accord with the instructions from your office that "when the records in the past show that the work was performed, but do not show accurately the 'actual cost' thereof, the entire deposit should be treated as earned."

Prior to the act of February 24, 1909, there was no authority for the repayment of any excess of the amount deposited for the platting of a mineral claim and other office work in the surveyor-general's office. The estimated cost of the work was covered into the Treasury as a lump sum under the mining regulations (Par. 91), and if "no accounts have ever been kept showing the cost of office work on mining surveys," as stated by the surveyor-general, it was evidently because the cost was estimated with reference to the fixed cost of work that would necessarily have to be performed in the platting and other office work upon every mining survey, and other expenses incident thereto, which can only be approximated. For that reason the entire deposit was treated as earned.

The instructions of your office and the decision of the surveyor-general are not in accord with either the letter or the spirit and purpose of the act, which evidently contemplates that an account shall be stated in every case where application for repayment is made, and if it appears that there is any excess in the amount deposited, over and above the "actual cost" of the work performed and the expenses incident thereto, it should be stated and certified by your office from the best data and information obtainable.

The cost of the platting of said survey and of the copies of said plat and field notes required to be made of mineral surveys should be ascertained by the value and usual charge for such work at the time it was rendered. The other expenses incident thereto which can only be approximated should be ascertained from such data and information as you may acquire from the records or custom of your office showing what proportion of the estimated cost such expenses bear to the whole amount.

You will instruct the surveyor-general to state this account in accordance with the instructions herein.

NORTHERN PACIFIC RAILWAY COMPANY.

Motion for review of departmental decision of June 15, 1909, 38 L. D., 46, denied by First Assistant Secretary Pierce, August 27, 1909.

OKLAHOMA LANDS—SCHOOL SECTIONS—SOLDIERS DECLARATORY
STATEMENT—SECTION 8, ACT OF JUNE 16, 1906.

JOHN F. BUTLER.

A soldiers declaratory statement of record at the date of the act of June 16, 1906, excepts the land covered thereby from the provisions of section 8 of that act, reserving sections 13 for the benefit of the future State of Oklahoma.

First Assistant Secretary Pierce to the Commissioner of the General
(W. C. P.) *Land Office, August 27, 1909.* (S. W. W.)

This is the appeal of John F. Butler from your office decision of December 23, 1908, affirming the action of the local office rejecting his application to make homestead entry for the SW. $\frac{1}{4}$, Sec. 13, T. 2 N., R. 9 E., Woodward, Oklahoma, land district.

This application was filed January 13, 1907, and based upon a soldier's declaratory statement filed March 23, 1906, by John F. Butler, as agent of James J. Butler, and was rejected by the local office for the reason that the land was included in the grant to the State of Oklahoma under the act of June 16, 1906 (34 Stat., 267), and for the further reason that the application to make entry was filed after the declaratory statement had expired.

It appears from the record that John F. Butler is the son and only heir of James J. Butler; that the said James J. Butler died May 10, 1906, and on or about August 1, 1906, John F. Butler sought legal advice as to what action was necessary to protect his interests as the heir of his father in the land for which the declaratory statement had been filed, and was informed by counsel that all that was necessary for him to do was to cultivate and improve the land; and that since receiving that advice he has fenced the land and planted thirty acres of it in corn, and has only been recently informed that it was necessary for him to make entry of the land.

Your office decision under consideration in affirming the action of the local office is based upon the Department's decision of May 12, 1908 (not reported), in the case of Lacy R. Foster, in which it was held that a soldier's declaratory statement has never been accorded the segregative effect of an entry and that the filing of such a declaratory statement did not operate to defeat the grant made to the State by the act of June 16, 1906, *supra*.

The appeal assigns error in your decision in holding that the case is analogous to that of Lacy R. Foster above mentioned, and in further holding that the filing of a soldier's declaratory statement, though followed up by action taken in good faith, did not operate as a segregation of the tract so as to except it from the terms of the act by which the grant was made to Oklahoma.

The act of June 16, 1906, *supra*, providing for the admission of the future State of Oklahoma, provides, in part, as follows:

That section thirteen in the Cherokee Outlet, the Tonkawa Indian Reservation, and the Pawnee Indian Reservation, reserved by the President of the United States by proclamation issued August nineteenth, eighteen hundred and ninety-three, opening to settlement the said lands, and by any acts of Congress since said date, and section thirteen in all other lands which have been or may be opened to settlement in the Territory of Oklahoma, and all lands heretofore selected in lieu thereof, is hereby reserved and granted to said State.

In construing the act of 1906, this Department has held that it extended only to unappropriated public lands, and as the sole object of the reservation made by the act was to protect the grant and not to extend it, only land having the character of unappropriated public land on June 16, 1906, fell within the reservation, and the fact that the land thus appropriated might subsequently be restored to the public domain did not, in the absence of express construction, subject such land to the terms of the act. See Andrew J. Billan (36 L. D., 334).

The question was thoroughly considered by the Department in that case, the decision being a most exhaustive one and numerous decisions of the Supreme Court were cited which held that rights such as those acquired by a homestead entryman are not destroyed by a grant in general terms; that such grants are confined to lands which Congress could rightfully bestow without disturbing existing relations and producing vexatious conflicts.

The Department's decision in the case of Lacy R. Foster was based upon the decision in the case of Jared *v.* Reeves (27 L. D., 597), wherein it was held that a soldier's declaratory statement does not segregate the land covered thereby, and for that reason is not subject to contest. It is true that a soldier's declaratory statement is not subject to contest upon the ground of failure to comply with the law as to residence, cultivation and improvement, because under the law the soldier is allowed six months from the date of the filing of his declaratory statement within which to make entry and settle upon the land, but, at the same time, the Department has held that a soldier's declaratory statement is in itself the initiation of a right under the homestead law. (Thraikill *v.* Long, 26 L. D., 639.)

Section 2304 of the Revised Statutes, which provides for the filing of declaratory statements by certain qualified soldiers, contains this language—

Such homestead settler shall be allowed six months after locating his homestead, and filing his declaratory statement, within which to make his entry and commence his settlement and improvement.

The Department has specifically held that the filing of a soldier's declaratory statement by an authorized agent of the soldier, and an

abandonment thereof, exhausts the soldier's homestead right. (Truman Wheeler, 19 L. D., 60; John Benham, Id., 274.) If, therefore, by filing a declaratory statement the soldier is held to have exhausted his right, it would seem to necessarily follow that the filing of a declaratory statement constitutes the fullest possible assertion of the homestead right; otherwise it is not conceived how the homestead right could be exhausted by the filing of the declaratory statement.

The right to initiate a homestead entry in this manner was bestowed upon soldiers by Congress as a special privilege in consideration of special services rendered the country in time of need, and it would seem to have been a vain thing to provide that the soldier after selecting the land might file a declaratory statement therefor, and that by so doing while he exhausted his homestead right he acquired no rights which the government should recognize. As was said in the Billan case, *supra*, in the case of one claiming under a homestead entry of record, the promise given by the government and accepted by the entryman was, first, a recognition of his right to enter the particular tract, and that it is subject to disposition under the homestead law, and, second, that upon compliance with the conditions imposed, he will be permitted to acquire the legal title to the land entered. It would seem that substantially the same thing is done in the case of filing of a homestead declaratory statement. The soldier is required to exhibit his qualifications to make entry, and it must be determined by the government that the land is subject to disposition under the homestead law, and these essentials must be exhibited and determined, respectively, before the declaratory statement will be accepted.

Respecting the effect of a preemption declaratory statement, which is similar in many respects to a soldier's declaratory statement, the Supreme Court has said:

When the declaratory statement is accepted by the local officers and the fact noted on the land books, the effect is precisely the same as that which follows from the acceptance of the verified application in a homestead case. [Whitney v. Taylor, 158 U. S., 85.]

If, therefore, the grant to the Territory, now the State of Oklahoma, made by the act of June 16, 1906, operated only upon such lands as were not appropriated at the date of the act, and if, as stated by the Department in the Billan case and in the cases cited therein, decided by the Supreme Court, it was not the intention of Congress in making a general grant, such as was made to Oklahoma in this case, to disturb existing relations and produce vexatious conflicts, it follows that the land in question, having been appropriated by the soldier's declaratory statement at the date of the act making the grant, was excepted therefrom, and the title of the State could never

attach whether the declaratory statement was subsequently abandoned or not.

This conclusion is reached by the Department after careful consideration, and the decision in the case of Lacy R. Foster and like decisions in other cases are hereby overruled.

Inasmuch, however, as the soldier in this case died prior to the expiration of the period provided for by law, during which he should have made entry for the land, and as such entry was not made within that period by his heirs, it follows that the heirs have no right to make entry by virtue of the declaratory statement; but as it appears from the record that John F. Butler, the heir of the soldier and appellant herein, has fenced the lands and has been cultivating a large portion thereof, he should be allowed an opportunity to enter the same upon showing himself duly qualified.

Your office decision is accordingly modified.

RESERVOIR SITE—EXTENSION OF TIME FOR COMPLETION OF RESERVOIR.

FULTON v. BUCHHOLZ.

The act of January 13, 1897, requires that a reservoir constructed under its provisions shall be completed within two years from the date of the filing of the declaratory statement, and the land department is without authority to extend that period so as to defeat an intervening adverse claim.

First Assistant Secretary Pierce to the Commissioner of the General
(W. C. P.) *Land Office, August 27, 1909.* (S. W. W.)

This is the appeal of Andrew Fulton from your office decision of December 22, 1908, holding for cancellation, as to the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 35, T. 3 N., R. 22 E., Pierre, South Dakota, land district, his homestead entry No. 9574, serial number 01934, allowed May 9, 1897, for the entire southwest quarter.

It appears from the record that on August 23, 1904, Ernst Buchholz filed reservoir declaratory statement, No. 735, serial 01876, under the provisions of the act of January 13, 1897 (29 Stat., 484), for the land in question, and the homestead entry of Fulton was allowed, subject to the reservoir declaratory statement; that thereafter, in due course, Buchholz, having submitted evidence of the construction of a reservoir on the land, which, in the opinion of your office, warranted its reservation for the purposes of watering stock, as provided by the said act of 1897, the local office was directed to serve notice on Fulton, the homestead claimant, to show cause why his homestead entry should not be canceled; that in response to such notice, Fulton made a showing upon the consideration of which your office ordered a hearing for

the purpose of determining the validity of the reservoir declaratory statement.

As a result of the hearing, the register and receiver found that a reservoir had been constructed on the land and it had been used as a public watering place for live stock but that forty acres only should be reserved for the purpose of the reservoir, and they recommended accordingly that the reservoir declaratory statement should be canceled as to three of the forty-acre tracts originally included therein. From that decision both parties appealed to your office, where it was held in the said decision of December 22, 1908, that eighty acres were necessary to meet the requirements of the reservoir in question, and that the homestead entry should be canceled as to the N. $\frac{1}{2}$ SW. $\frac{1}{4}$ of the quarter-section involved, and the reservoir declaratory statement canceled as to the S. $\frac{1}{2}$ thereof. It is from that holding that the homestead claimant has appealed to the Department.

The act of January 13, 1897, *supra*, provides that any person, live stock company, or corporation desiring to secure the benefits of the act shall file a declaratory statement in the local land office in the district where the land is situated, which statement, among other things, shall state what business such corporation is engaged in, specify the capacity of the reservoir in gallons, and whether such person, company, or corporation has filed upon other reservoir sites in the same county, and if so, how many. Continuing, the act provides in section 3 thereof:

That at any time after the completion of such reservoir or reservoirs which, if not completed at the date of the passage of this act, shall be constructed and completed within two years after filing such declaratory statement, such person, company, or corporation shall have the same accurately surveyed, as hereinafter provided, and shall file in the United States land office in the district in which such reservoir is located a map or plat showing the location of such reservoir, which map or plat shall be transmitted by the register and receiver of said United States land office to the Secretary of the Interior and approved by him, and thereafter such land shall be reserved from sale by the Secretary of the Interior so long as such reservoir is kept in repair and water kept therein.

It will be observed that the reservoir declaratory statement in this case having been filed on August 23, 1904, the two years during which the reservoir should have been constructed expired August 23, 1906. No evidence of construction having been filed, notice was served upon Buchholz requiring him to show cause why his declaratory statement should not be canceled on account of his failure to construct a reservoir, but upon his submitting an affidavit, duly corroborated, in which he alleged that he had constructed and completed a reservoir on the land prior to the first day of August, 1906, and that he was ignorant of the requirement of the statute in that he should have the same surveyed and a map filed, until the receipt of the notice calling upon him to show cause why his declaratory statement should not be canceled,

whereupon he went to Pierre to secure the services of a surveyor, but owing to the severe weather and heavy snow, it was impossible for him to secure a surveyor at that season of the year, in view of which he asked that the time be extended within which he be allowed to submit proof of the construction and maintenance of the reservoir.

Upon consideration of this affidavit, your letter of March, 1907, advised the register and receiver that as the declarant appeared to have complied with the statutory requirement in the matter of constructing a reservoir, he would be allowed until July 1, 1907, in which to file proof thereof by filing the map and field notes required. The required map was filed in the local land office June 28, 1907, and upon its receipt in your office an order was issued calling upon Fulton to show cause why his homestead should not be canceled.

It is contended by the appellant that your office had no authority to extend the statutory period within which the map and field notes of the constructed reservoir should have been filed; that at the time of the allowance of his homestead entry Fulton had a right to rely upon the fact that no map and field notes of the constructed reservoir had been filed, and that for that reason all rights which might have been acquired by the filing of the declaratory statement had lapsed or been forfeited.

Appellant also contends that the evidence shows that there is no necessity for a reservoir in that section of the country, as the people who live there can secure all the water necessary for domestic and other purposes from the creeks and various water holes contained therein, which, though located on private property, are, as a matter of fact, accessible to the public generally. Appellant also asks that the Department consider statements made by the declarant Buchholz as to the purpose for which he desired the reservoir at the time of filing his declaratory statement, and in that connection that the Department also consider the statement made by Buchholz at the same time in connection with two other declaratory statements which he filed for lands in the immediate vicinity.

The entire record has been carefully examined and the evidence is not entirely satisfactory, there being much conflict in testimony as to whether or not there is any necessity for maintaining a public reservoir upon the land in question. The evidence is also conflicting as to when the dam was actually completed. The witnesses for the reservoir claimant testified that the reservoir contained a great deal of water in the spring of 1907, while the witnesses for the homestead claimant testified that at the time of the homestead entry during the first part of May, 1907, the dam was not to exceed two or three feet in height and that the reservoir contained not more than ten or fifteen barrels of water. In this connection, the Department considers as important the testimony of the surveyor who was employed by

Buchholz to survey the reservoir. This witness stated that he surveyed the reservoir in March, 1907, but did not make a record of such survey for the reason that in his opinion the reservoir, as it existed then, did not meet the requirements of the statute, and he accordingly returned to the place and made another survey in June, 1907, which was after additional work had been done upon the reservoir and dam by Buchholz.

Respecting the contention of the appellant that your office had no authority to extend the time upon the filing of the plat, it may be said that the statute does not require in terms that the plat and field notes must be filed immediately upon the construction of the reservoir. The requirement, however, is plain that the construction must be completed within two years from the date of the filing of the declaratory statement, and it seems clear, therefore, that your office could not extend the period for the construction of the reservoir so as to defeat an intervening claim.

According to the testimony of the surveyor employed by Buchholz, the reservoir was not completed so as to meet the requirements of the statute in March, 1907. In the month of May following, the homestead entry of Fulton was allowed for the land. Thereafter, viz., early in June following, the surveyor found that the reservoir had been completed. In the face of the intervening homestead entry, the burden was upon the reservoir claimant to show definitely the time of the completion of the reservoir, and the Department is, therefore, justified in presuming that the survey was made as soon as the work was accomplished. This being so, it must be held that the reservoir was not completed until after the homestead entry of Fulton had been allowed, from which it follows that any rights acquired by the filing of the declaratory statement had been forfeited in the failure of the declarant to comply with the requirements of the statute.

Moreover, the Department has examined the declaratory statements filed by Buchholz and referred to at the time of the hearing, from which it appears that on August 23, 1904, he filed three declaratory statements, No. 735 for the land involved herein, No. 736 for the SW. $\frac{1}{4}$ of Sec. 2, in the adjoining township on the south, and No. 737 for the NW. $\frac{1}{4}$ of Sec. 1 in the township adjoining on the south. In each of these declaratory statements the declarant stated under oath that the reservoir was to be used in connection with the business of the applicant in raising and grazing about 500 head of sheep.

Buchholz testified at the hearing that he owned only a few head of horses and cattle at the time of filing the declaratory statement and he did not immediately bring even all of those to that section of the country when he moved there from Ireland.

From the foregoing, it is plain that Buchholz did not file his declaratory statements in good faith. He did not need three reser-

voirs in the immediate locality for the purpose of watering 500 sheep, and, moreover, he did not own 500 sheep. It is also observed that in the blank space provided in the forms for reservoir declaratory statements to show what other statements have been filed under that act, Buchholz failed in any one of the three statements filed by him to mention the fact that he had filed the other two.

From these considerations, the Department is of the opinion that the reservoir declaratory statement should be canceled in its entirety and the homestead entry allowed to remain intact. Your office decision is modified accordingly.

SILETZ INDIAN LANDS—HOMESTEAD ENTRY—ACTUAL RESIDENCE.

ADAMS *v.* COATES.

Under the act of August 15, 1894, providing for the disposition of lands in the Siletz Indian reservation, a homestead entryman of any such lands is required to show, as a prerequisite to patent, that he has established and maintained *actual* residence upon the land for a period of three years.

First Assistant Secretary Pierce to the Commissioner of the General Land Office, August 31, 1909. (O. L.)

William D. Coates filed a petition for exercise of the supervisory power of the Secretary of the Interior to reconsider departmental decisions in contest of Elizabeth W. Adams against his homestead entry for the NW. $\frac{1}{4}$, Sec. 33, T. 8 S., R. 9 W., W. M., Portland, Oregon, canceling his entry and denying motion for review and rehearing.

Said petition is based upon the claim that Coates's residence on and improvement of the land complied with the law so far as physically possible, and that contestant in fact made no case, wherefore the contest should have been dismissed.

On December 14, 1892 (Sen. Ex. Doc., 52d Cong., Vol. 3, No. 39), Congress was advised by the Secretary of the Interior that lands within the Siletz Reservation were "mostly mountainous and densely timbered with good fir and cedar trees and well watered with rapid running streams which will furnish a good means of getting timber out."

The act of August 15, 1894 (28 Stat., 323, 326), opened lands in that reservation to homestead entry, and required—

final proof to be made within five years from the date of entry, and three years' actual residence on the land shall be established by such evidence as is now required in homestead proofs as a prerequisite to title or patent.

It is to be noted that, while the residence required by the act above quoted is reduced to three years, its character is particularly pre-

scribed—it must be “actual.” This term is new to Federal legislation concerning proceedings to acquire title to public lands, and it must be presumed that Congress used the same advisedly. The language of the statute being plain and unequivocal, leaving no room for construction, an apt and sensible meaning must be given thereto, it being inadmissible to either import anything into it or eliminate anything therefrom in order to change or modify its plain intent.

It is fair to presume that the law gives meant something by the use of the word “actual;” that they supposed it added something to the word “settlers.” [McIntyre v. Sherwood, 82 Cal., 142.]

It [actual] is something real in opposition to constructive or speculative; something existing in fact. [Kelly v. Supreme Council, 61 N. Y. Supp., 394.]

Actual occupancy is defined as an open, visible, occupancy, as distinguished from the constructive possession which follows the legal title. Actual possession has practically the same meaning. It means possession in fact, effected by actual entry upon the premises and actual occupancy. The word “actual” is usually used in a statute in opposition to “virtual” or “constructive,” and calls for an open, visible occupancy. [Cutting v. Patterson (Minnesota), 85 N. W., 172.]

Actual settlement means actual residence, [Mosely v. Torrence, 71 Cal., 321.]

An actual settler upon land belonging to the State is one who established himself upon the land or fixes his residence upon it to take possession for his exclusive occupancy and use, with a view to acquire title to it by purchase from the State. For that purpose an actual entry upon land belonging to the State, followed by making improvements upon it, or building a house thereon in which to reside, and occupation of the land while doing such acts, are evidence of such a settlement as gives to the occupant, if he possesses the qualifications prescribed by law, an inchoate right to purchase the land and operates as notice to all the world of the right. [Gavitt v. Mohr, 68 Cal., 506, 509.]

An actual settler upon land is one who has actually established his residence upon it, and not one who has inclosed it and cultivated it, intending at some future time to live upon it. The use of the word “actual” would seem to have been intended to prohibit the courts from extending the meaning of the word “settlers” by construction . . . The purpose was to secure those who had made or should make homes upon the school lands an opportunity to make them permanent by purchase of the lands upon which their residences were established. [Baker v. Millman (Texas), 13 S. W., 618, 619.]

The clearing and cultivation of the land by Coates is so nominal as to amount to a mere pretense, and the improvements are of a minor character. Upon the essential question as to whether any actual residence for three years or any other period was established, while the evidence is conflicting, the great preponderance thereof is to the effect that he did not maintain any such residence, but, on the contrary, made visits to the land, which were of a mere transitory and temporary character. His wife and two children resided at Hoquiam and Oregon City, the former at least never having been on the premises; and, while the excuse given for failure of his family to reside upon the land (obesity and heart trouble of his wife) might, if the record gave evidence of a *bona fide* actual residence thereon by the entryman, be accepted, it tends, under the circumstances existing

here, rather to prove that he never did intend to establish a home at a place where it was impossible for his family to live.

On his own statement Coates was on the land about twenty-six months and this only at intervals; at no time did he show an intention to remain there or make the land his home to the exclusion of the place at which his family was located. His acts were not more than sufficient to indicate preparation to fit the land to be his home and protect his entry from attack for the two years allowed by the law, and even this is, as above indicated, negatived by the fact that his family could not live there. They certainly can not be held to constitute the actual residence for three years required by the statute as "prerequisite to title or patent."

The contestant did not adduce proof of facts justifying cancellation of the entry. Her first and third witnesses were at the claim for the first time on February 6, 1907, and the other witness was there for the first time on December 14, 1906. Nothing which they knew or could know disproved Coates's claim of settlement and residence from July, 1900, to July 28, 1903; and evidence as to the appearance of the improvements in December, 1906, and February, 1907, is not deemed sufficient to justify the inference that Coates had not, on July 28, 1903, complied with the law as to residence. Contestant therefore did not earn a preference right, for no aid rendered by her caused cancellation of the entry. Coates's own evidence, however, does require such cancellation.

The petition sets up no facts or error of law requiring recall or modification of said decision, and none otherwise appearing, the petition is dismissed.

NONMINERAL APPLICATIONS FOR LANDS CLASSIFIED AS COAL.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., September 7, 1909.

Registers and Receivers,

United States Land Offices.

GENTLEMEN: The circular of May 8, 1909 (37 L. D., 681), construing paragraph 13 of the circular approved April 10, 1909 (37 L. D., 653), entitled "Regulations regarding the Classification and Valuation of Coal Lands," is modified to read as follows:

1. You will advise any person presenting a nonmineral application or filing for lands classified in schedules and on maps as containing workable deposits of coal subject to disposal at prices fixed, that he will be allowed thirty days in which to submit such evidence as he can, preferably the sworn statements of experts or practical

miners, showing that the land is in fact not coal in character, together with a request that the same be reclassified, and that in the event of failure to furnish said evidence within the time specified, the application will be rejected. Such applications will be given proper serial numbers, and notation thereof made upon the records, and, when accompanied by the necessary evidence, they will be forwarded to the General Land Office for action, where, if upon the showing made, and such other inquiry as may be deemed proper, the land is classified as agricultural land, the nonmineral application, in the absence of other objections, will be returned for allowance. If reclassification be denied, the applicant may, within thirty days from receipt of notice, apply for a hearing, at which he may be afforded an opportunity for showing that the classification is improper, in which event he must assume the burden of proof. If he should fail to apply for a hearing within the time allowed, his application to enter or file will be finally rejected.

2. Nonmineral applications for lands temporarily withdrawn from all entry, where such temporary withdrawal is based upon data in possession of the Department, showing that the lands withdrawn are valuable for coal, may be treated in like manner as nonmineral applications for lands actually classified. However, in such cases, as the lands are withdrawn pending classification, it is possible that the particular tract applied for by the agricultural claimant may not be classified as coal land, and in that event, of course, no hearing will be necessary, and in such cases, therefore, the agricultural applicant may, at his election, tender his application unaccompanied by the evidence specified in paragraph 1, and have the same suspended to await the result of its classification. If the land applied for is classified as coal land, the agricultural claimant will then be allowed to proceed as provided in paragraph 1 hereof, and should he then be unable to show that the land is not in fact coal in character, his nonmineral application or filing will be rejected, and in such case the right of election mentioned in the act of March 3, 1909 (35 Stat., 844), for the protection of the surface rights of entrymen, will not be allowed.

3. Lands noted on your records merely as "withdrawn" coal lands may be entered under the agricultural laws as provided by the last sentence of paragraph 2 of the circular of April 24, 1907 (35 L. D., 681). The instructions of April 24, 1907, *supra*, are modified accordingly.

Very respectfully,

S. V. PROUDFIT,
Acting Commissioner.

Approved:

R. A. BALLINGER,
Secretary.

COAL LANDS—SURFACE RIGHTS OF ENTRYMEN—ACT OF MARCH 3, 1909.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 7, 1909.

REGISTERS AND RECEIVERS,
United States Land Offices.

GENTLEMEN: The circular approved March 25, 1909 (37 L. D., 528), of instructions, under the act of Congress of March 3, 1909 (35 Stat., 844), for the protection of surface rights of entrymen, is amended to read as follows:

THE PURPOSE OF THE ACT.

1. The main purpose of the act is to protect persons who, in good faith, have located, selected, or entered, under nonmineral laws, public lands which are, after such location, selection, or entry, classified, claimed, or reported as being valuable for coal by providing a means whereby such persons may, at their election, retain the lands located, selected, or entered, subject to the right of the Government to the coal therein. It applies alike to locations, selections, and entries made prior to its passage and those made subsequently thereto.

The act also provides for the disposal, under the existing coal-land laws, of the coal contained in such lands.

ELECTION.

2. All persons who, in good faith, locate, select, or enter, under the nonmineral laws, lands which are, subsequently to the date of such location, selection, or entry, classified, claimed, or reported as being valuable for coal, may elect, upon making satisfactory proof of compliance with the laws under which they claim, to receive patents upon their location, selection, or entry, as the case may be, such patents to contain a reservation to the United States of all coal in the lands and the right of the United States, or any one authorized by it, to prospect for, mine, and remove the coal in accordance with the conditions and limitations imposed by the act; or may decline to elect to receive patent with such reservation, in which event proceedings shall be had as hereinafter indicated.

LANDS CLASSIFIED, CLAIMED, OR REPORTED AS COAL LANDS.

3. Upon receipt of these instructions, registers and receivers will promptly advise, by registered mail, each nonmineral claimant to land, which, subsequent to location, selection, or entry, has been classified, claimed, or reported as being valuable for coal, that at the time of applying for notice of intention to submit final proof he must,

in writing, state whether he elects to receive a patent containing the reservation prescribed by the act.

In the event of election to receive such a patent, no further inquiry will be necessary respecting the coal character of the land.

In the event the claimant declines to elect to receive such patent, evidence will be received at the time of making final proof for the purpose of determining whether the lands are chiefly valuable for coal; and the entryman, locator, or selector will be entitled to a patent without reservation unless at the time of hearing on final proof it shall be shown that the land is chiefly valuable for coal.

The claimant may, after determination at final proof that the lands are chiefly valuable for coal, elect to receive patent with the statutory reservation, provided, of course, proof of compliance with the law in other respects is satisfactory.

NOTICE TO CHIEF OF FIELD DIVISION.

4. Where the nonmineral claimant indicates his intention to contest the alleged coal character of the land involved, the chief of the appropriate field division must be advised sufficiently in advance of the date fixed for the taking of the final proof to enable him to be prepared to represent the Government at the time such final proof is made.

ACTION OF THE REGISTER AND RECEIVER.

5. In every case where there is controversy as to the coal character of the land, and evidence is offered thereon, the register and receiver will forward the testimony and other papers to the Commissioner of the General Land Office, with appropriate recommendation, notice of which should be given the claimant.

WHERE FINAL PROOF HAS ALREADY BEEN SUBMITTED.

6. Where satisfactory final proof has heretofore been made for lands entered under the nonmineral laws, the claimant will be entitled to a patent without reservation, except in those cases where the Government is in possession of sufficient evidence to justify the belief that the land is, and was before making final proof, known to be chiefly valuable for coal, in which case hearing will be ordered. If, at said hearing, it is proven that the land is chiefly valuable for coal, and that the claimant knew that fact at the time of making final proof, the entry shall be canceled, unless the claimant shall prove that he was at the time of the initiation of his claim in good faith endeavoring to secure the land under the nonmineral laws, and not because of its coal character, in which event he shall be permitted to elect to receive patent with the reservations prescribed in the statute. If it is not shown that the land is chiefly valuable for coal, the claimant shall be entitled to patent without reservation.

DISPOSAL OF THE COAL DEPOSITS.

7. Where election to accept patent with the prescribed reservation has been made by the nonmineral claimant, coal deposits in the land may be prospected for, mined, and removed under the existing coal-land laws, provided the person desiring so to do first procures the consent of the surface owner, or furnishes such security for payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction. But no coal declaratory statement or application to purchase under sections 2347-2352 of the Revised Statutes, and the regulations of this office, will be received until the nonmineral claimant, upon the making of satisfactory proof, has elected to take a patent containing the prescribed reservation, and not then unless such coal declaratory statement or application to purchase is accompanied by the consent of the surface owner, or evidence showing that security has been given as prescribed by the act.

Appeals shall be allowed in all proceedings brought hereunder as in other cases.

CERTIFICATES AND PATENTS.

8. Coal declaratory statements, certificates, and patents issued under the provisions of this act will describe the land by legal subdivisions as, under the general coal-land laws, and payment will be made at the price fixed for the whole area, but appropriate conditions and limitations will be incorporated in the patent fully defining the interests and rights of the respective parties. To this end you will note on each coal receipt and certificate issued by you, in pursuance thereof, the words "Patent will contain conditions and limitations of the act of March 3, 1909 (35 Stat., 844)."

Very respectfully,

S. V. PROUDFIT,
Acting Commissioner.

Approved:

R. A. BALLINGER, *Secretary.*

Form Approved by the First Assistant Secretary, September 20, 1909.

DEPARTMENT OF THE INTERIOR.

4-357

NOTICE OF RIGHT OF ELECTION IN CASES WHERE FINAL PROOF HAS NOT BEEN
SUBMITTED.

[Act March 3, 1909.]

U. S. Land Office _____.

No. _____.

_____, 19____.

SIR: Your attention is directed to the provisions of the act of March 3, 1909, printed on the back hereof, and you are hereby notified that subsequently to

your _____ [insert kind of entry, location, or selection] No. _____, made _____, 19____, for _____, section _____, township _____, range _____, _____ meridian, said tract was classified, claimed, or reported as being valuable for coal; also that at the time of applying for notice to submit final proof you must state in writing whether you elect to receive a patent which shall contain a reservation to the United States of all coal in said land, and the right of the United States, or any person or persons authorized by it, to prospect for, mine, and remove coal from the same, in accordance with the conditions and limitations imposed by said act. Should you elect to receive such patent, no further inquiry will be made respecting the coal character of the land, and patent will issue, with the statutory reservation, provided satisfactory proof of your good faith and of compliance on your part with provisions of the law under which you claim be submitted. In the event you decline to elect to receive such patent, evidence will be received at the time of making final proof with a view to determining whether the land is chiefly valuable for coal, and, the proof being in other respects regular and satisfactory, you will be entitled to receive patent without reservation unless at the time of the hearing on final proof it shall be shown that the land is chiefly valuable for coal.

Respectfully,

_____,
Register.

_____,
Receiver.

ELECTION TO RECEIVE PATENT UPON NONMINERAL CLAIM EXCLUSIVE OF ANY DEPOSITS
OF COAL IN THE LAND.

STATE OF _____, County of _____, ss:

I, _____, of town of _____, county of _____, State of _____, who, on _____, 19____, made location, selection, or entry No. _____, for the _____, section _____, township _____, range _____, _____ meridian, being duly sworn, do hereby elect, upon submission of satisfactory proof of compliance with law under which my claim was initiated, to receive patent for the lands, which patent shall reserve to the United States all of the coal in said lands, with the right of the United States, or any person authorized by it, to prospect for, mine, and remove the coal from same in accordance with the conditions and limitations of the act of March 3, 1909 (35 Stat., 844).

In accordance with above election, I hereby authorize the proper officer or officers of the United States, upon submission of satisfactory final proof upon my location, selection, or entry, to issue final certificate or other paper as basis for patent, containing the reservation of the coal hereinbefore described, and to issue patent in accordance therewith.

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (or has been satisfactorily identified before me by _____ [give full name and post-office address]); and that said affidavit was duly subscribed and sworn to before me at my office in _____, this _____ day of _____, 19____.

(Official designation of officer.)

NOTE 1.—This affidavit of election may be executed before any officer authorized to administer oaths and possessed of a seal.

NOTE 2.—The attention of parties in interest is directed to the provisions of the act of March 3, 1909, copy of which is printed below.

[35 Stat., 844.]

AN ACT For the protection of the surface rights of entrymen.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who has in good faith located, selected, or entered under the nonmineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal, may, if he shall so elect, and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal, but no person shall enter upon said lands to prospect for, or mine and remove coal therefrom, without previous consent of the owner under such patent, except upon such conditions as to security for and payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction: *Provided*, That the owner under such patent shall have the right to mine coal for use on the land for domestic purposes prior to the disposal by the United States of the coal deposit: *Provided further*, That nothing herein contained shall be held to affect or abridge the right of any locator, selector, or entryman to a hearing for the purpose of determining the character of the land located, selected, or entered by him. Such locator, selector or entryman who has heretofore made or shall hereafter make final proof showing good faith and satisfactory compliance with the law under which his land is claimed shall be entitled to a patent without reservation unless at the time of such final proof and entry it shall be shown that the land is chiefly valuable for coal.

Approved, March 3, 1909.

HOMESTEAD CONTEST—PREMATURE CHARGE—OFFER TO SELL
RELINQUISHMENT.

ROSSMAN ET AL. *v.* DICKEY.

Where an affidavit of contest charging abandonment is properly rejected because prematurely tendered before the expiration of six months and one day after entry, and a second affidavit is filed by another person after the expiration of that period, the second contest is entitled to priority, notwithstanding the affidavit was executed prior to the expiration of the period mentioned, especially where both affidavits were executed the same day.

An offer to sell the relinquishment of an entry is not of itself a sufficient ground for contest.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, September 11, 1909.* (E. F. B.)

W. J. Rossman has appealed from the decision of your office of April 20, 1909, holding his contest affidavit against the homestead entry of Robert L. Dickey subject to the prior contest of Alma Newbern.

Dickey made entry, January 22, 1908, of the SW. $\frac{1}{4}$, Sec. 35, T. 5 N., R. 18 E., Pierre, South Dakota. July 23, 1908, Rossman filed

affidavit of contest against said entry, alleging abandonment for six months next prior to the date of the affidavit of contest, and that he had offered his relinquishment of the entry for sale.

The local officers rejected the affidavit of contest because it was prematurely filed, under the established practice of your office that a contest charging abandonment will not lie until the expiration of six months and *one day* after entry, exclusive of the day of entry. *Baxter v. Cross* (2 L. D., 69).

July 24, 1908; the local officers received by mail affidavit of contest by Alma Newbern against said entry, which was placed of record at 9 A. M. of that day, and notice was issued thereon.

On the same day the Rossman affidavit was again tendered at 11:58 A. M., which was received and held subject to the result of the contest of Newbern.

Upon the appeal of Rossman your office sustained the action of the local officers, and from your decision he has appealed to the Department, alleging error in holding that appellant did not set up a cause of action independent of the allegation of abandonment, and in not finding that Newbern's affidavit was executed at Philip, South Dakota, July 23, 1908, the day appellant's application was executed and tendered.

Where an affidavit of contest was subject to rejection when offered because it was prematurely filed but notice was issued thereon after the expiration of six months and a day, it will not be dismissed upon motion of a second contestant whose affidavit was filed after the expiration of said period. *Hague v. Gilliard* (21 L. D., 467). . Where the affidavit is accepted and notice is issued thereon the contestee alone can avail himself of the rule that it is premature if brought before the expiration of six months and a day after entry, as he can before the expiration of that period defeat the contest by curing his laches. *Hemsworth v. Holland* (8 L. D., 400); *Sietz v. Wallace* (6 L. D., 299).

But where the local officers rejected the affidavit and their action in that respect was not erroneous because the affidavit was prematurely tendered, the second contestant whose affidavit is filed after the expiration of the period in which the entry is protected from contest on the charge of abandonment, is entitled to priority although the affidavit was executed prior to the expiration of that time, especially where both affidavits were executed the same day.

While an offer to sell a relinquishment of an entry may be alleged as inducement to the charge of abandonment, it is not of itself a cause of action and no notice could properly issue on that allegation alone. *Stubendorf v. Carpenter* (32 L. D., 139) and authorities cited.

Your decision is affirmed.

EXECUTION OF APPLICATION AND AFFIDAVITS—OFFICER—ACT OF MARCH 4, 1904.

EMMA C. LEWIS.

An application for extension of time within which to submit final proof upon a desert land entry, and the affidavits to support the same, must be executed before some officer within the provisions of the act of March 4, 1904; and where executed before a notary public can not be accepted.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, September 11, 1909.* (J. F. T.)

Emma C. Lewis has appealed to the Department from your decision of October 12, 1908, sustained upon motion for review March 24, 1909, rejecting her application for extension of time to submit final proof upon her desert-land entry number 536, made August 11, 1904, for the E. $\frac{1}{2}$, Sec. 35, T. 20 S., R. 58 W., 6th P. M., containing 320 acres, Pueblo, Colorado, land district.

Your action in rejecting said application is based upon the fact that the application and affidavits in support thereof were executed before a notary public, and by your letter "G" of October 16, 1906, same were returned to be executed before some properly qualified officer.

It is contended upon this appeal (and the sole question presented is) that this application and the affidavits in support thereof may be executed before a notary public and do not fall within the provisions of the act of March 4, 1904 (33 Stat., 59). The language of that act, so far as applicable to the question at bar, is:

That hereafter all proofs, affidavits and oaths of any kind whatsoever required to be made by applicants and entrymen under the . . . desert-land . . . acts may, in addition to those now authorized to take such affidavits, proofs and oaths, be made before any United States Commissioner, or commissioner of the court exercising federal jurisdiction in the territory, or before the judge or clerk of any court of record in the county, parish, or land district in which the lands are situated.

It seems clear that the application and affidavits in question fall within the description in the above-quoted section of the statute, and it is not perceived how the affidavits required for an extension of time under section 3 of the act of March 28, 1908 (35 Stat., 52), can be excepted from the provisions of the act of March 4, 1904, *supra*, and the acts to which same is amendatory and supplemental.

Your decision is accordingly affirmed.

REGISTRATION OF OFFICIAL LETTERS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 13, 1909.

SPECIAL DISBURSING AGENTS,

United States Land Offices.

SIRS: Itemized lists for registration of official letters will not hereafter be required.

As heretofore, you will be governed by the instructions of the circular of March 1, 1900 (29 L. D., 649), as to registration of official letters, with the exception that paragraph 9 of said circular is hereby amended to read as follows:

Special Disbursing Agents will purchase, from time to time, out of the allotment of funds advanced to them from the appropriation "Contingent Expenses of Land Offices," postage stamps for the registration of official letters.

In purchasing such stamps, the Special Disbursing Agent must secure a voucher (Form 4-665b) from the postmaster, and the Special Disbursing Agent should claim credit on his "Abstract of Expenditures for Contingent Expenses of Land Offices" and in his "Account Current" for the entire amount of stamps purchased as evidenced by vouchers secured as above. Although full credit will be given in the accounts of a Special Disbursing Agent for the number of stamps purchased, such vouchers for purchase of stamps will not receive the approval of this office unless the Special Disbursing Agent furnishes a certificate from the postmaster as to the actual number of official letters registered during the period for which his accounts are rendered.

In the event there are any unused stamps on hand at the end of a quarter, the Special Disbursing Agent will make due report of same upon the foregoing certificate of the postmaster.

Very respectfully,

FRED DENNETT, *Commissioner.*

Approved:

FRANK PIERCE,
Acting Secretary.

SILETZ INDIAN LANDS—HOMESTEAD—TIMBER LAND—CONTEST.

HAMILTON v. GRANT.

The submission of final proof within the lifetime of a homestead entry prevents expiration thereof during the pendency of the proof; and it is competent for the land department at any time while the entry remains in force to entertain a contest against the same.

Congress, with full knowledge that the Siletz Indian lands, opened under the act of August 15, 1894, were heavily timbered, having nevertheless limited disposal thereof to appropriation under the homestead, townsite, and mining laws, no presumption of bad faith arises from the mere fact that a tract of such lands entered as a homestead may be covered by a dense growth of timber.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, September 13, 1909.* (J. R. W.)

Milton B. Grant appealed from your decision of March 24, 1909, in contest of V. L. Hamilton against his homestead entry for N. $\frac{1}{2}$ SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 15, T. 8 S., R. 9 W., W. M., Portland, Oregon.

The land is within the former Siletz reservation opened to settlement and entry by executive proclamation of May 16, 1896 (29 Stat., 866), under act of August 15, 1894 (28 Stat., 323). July 21, 1902, Grant made entry and December 22, 1906, submitted commutation proof, which the local office rejected and he appealed. September 24, 1907, Hamilton filed contest affidavit charging that Grant never resided on or cultivated the land and that he never improved it except by building a small cabin. October 11, 1907, you allowed Hamilton to proceed with the contest. Hearing was had at the local office at which both parties participated, aided by counsel. July 30, 1908, the local office found that:

Entryman's improvements and cultivation since 1903 were not in good faith but a mere pretense. The condition of the cabin, its furnishings, the clearing and cultivation in 1902 and 1903 do not show that he was endeavoring in good faith to prepare his actual home on the land, or that he made his real home there to exclusion of the home occupied by his family in Falls City and Dallas. We therefore recommend cancellation of the entry.

You affirmed that action. The appeal alleges error of your office in not dismissing the contest because filed after expiry of the entry, when it ceased to be subject to contest; also that the evidence does not justify the findings of fact or warrant cancellation of the entry.

The Siletz act directed that the non-mineral land shall be disposed of until further provided by law under the townsite law and the homestead law:

Provided, however, That each settler, under and in accordance with the provisions of said homestead laws final proof to be made within five years from the date of entry and three years actual residence on the land shall be established by such evidence as is now required in homestead proofs as a prerequisite to title or patent.

This proviso, in effect, as to these lands, modifies section 2291, Revised Statutes, substituting three for five years period of residence, and like section 2291 allows two years additional for filing of final proof. There is room to contend that such entry expires in five years

unless final proof is offered, though the act is not clearly so expressed, nor is it necessary in this case so to decide. As proof was offered December, 1906, and the proof was still pending, the entry did not expire at end of five or seven years. The submission of final proof within life of the entry, as was here done, prevented its expiry. It would remain in force so long as final proof pended and it was competent for you to entertain a contest and accept aid of contestant. The authorities relied on by counsel, *Jackson v. Jackson* (1 L. D., 112), and *Dellage v. Larkin* (35 L. D., 378), are not in point, for in the first case the entry was made January 5, 1875, contest was filed September 12, 1882, no final proof being offered, more than seven years after entry; in the second case entry was made April, 1897, and was canceled January 5, 1905, for expiry, no final proof having been submitted, after which Dellage filed contest affidavit which was rejected. In this case, before expiry final proof was offered and the case was waiting action thereon when Hamilton tendered his assistance to show forfeiture of the entry by abandonment, which tender of service you accepted. This was within your discretion. You were not bound to reject the tender of service and act on the *ex parte* final proof alone. Grant's contention otherwise is not well founded.

Contestant and another witness, contestant on another claim, first saw the land September 19, 1907. They both had indistinct recollection of the character of the house and materially varied their testimony when their recollection was refreshed by view of a photograph shown them by defendant's counsel. Both were of opinion from the appearances that there had been no cultivation of any part of the claim and that the house had not been inhabited as the floor showed no wear and was not soiled. They did not profess to know where Grant in fact lived during his entry. The only other witness seems never to have seen the land. She testified that she had lived at Dallas eight years and had known Grant twelve or fifteen years, that Grant and his wife then lived in Dallas and had there lived for about six years, and before lived at Bridgeport. Witness had met Mrs. Grant at her home, on the streets, at the hop yard, skating rink, and at witness' home. In 1903 they picked hops together and Mrs. Grant was able to work during the picking season. She had been at Grant's father's farm. She does not associate now with the Grants as much as she used to, why "it is not necessary for me to tell." Bridgeport is seven miles from Dallas and she cannot tell how large a place it is. Grant became a mail carrier in 1903 after hop-picking, and she had heard he once worked for Mathews, but don't know.

This is clearly insufficient to prove that Grant lived at Bridgeport or elsewhere prior to becoming mail carrier after hop-picking in 1903, especially from admitted nonassociation with the Grants for reasons she prefers not to disclose. Grant's claim of residence on the land

extends only from his settlement, May, 1902, to his appointment as mail carrier, December, 1903. There was thus total failure of contestant to prove his charge. Appearances in 1907, four years after Grant's actual residence ceased on land situate like this in the humid conditions of the Siletz land on the Pacific coast, cannot alone prove failure to establish residence in face of direct and positive evidence of the fact. An example of the deceptiveness of appearances of non-habitation of the house, not to be overlooked, is the fact that just before he went into the mail service Grant took out the original floor and laid a new one and this is shown by himself and by Clifford, who helped in the work. The unworn condition of the floor is fully explained. The contest failed and should have been dismissed.

Your decision also held that—

where the land as in this case is of such character that it is clearly apparent that no practical compliance with the homestead law is possible the entry must be canceled for it is evident that good faith must be wanting and that contestée did not make the entry for the purpose of acquiring a home. (7 L. D., 555; 15 L. D., 276; 24 L. D., 272.)

The Department cannot assent to this conclusion as necessary under the facts shown. The land bears at least seven million feet of timber, probably more, on 120 acres. A soil that will produce such growth will produce any agricultural plants adapted to the climate and elevation. It is not sterile. No presumption of bad faith arises from dense timber growth because Congress, after being fully advised of the character of these lands by Senate executive document 39, volume 3, 52nd Congress, opened the land to homestead entry to exclusion of any other mode of disposal except as townsites and by mineral entry. The intent of Congress is that it shall be disposed of to homestead settlers and the heavily forested character is not in itself a fact suggesting suspicion of a settler's bad faith.

The authorities cited by your decision are not apposite. In *Wright v. Larson* (7 L. D., 555), Congress had not excluded the land from disposal under the timber and stone act. Larson's house was open, unchinked, without a floor, with only bark roof and gables insufficient to exclude rain, with no chimney or means for a fire, and untenable. These facts and the disposability of the land under the timber act raised a question of good faith on part of the preemption claimant which cannot be raised by such facts under the Siletz act.

In *Jamison v. Hayden* (15 L. D., 276), Jamison made homestead entry of land located as placers of which the mining claimants were in possession actually engaged in development and exploitation of its valuable flags and building stone. It was in all material respects and for like reason similar to the former, as also was *Benson v. State of Idaho* (24 L. D., 272). In Siletz cases, if bad faith is imputable to a settler from the fact that the land is heavily timbered, it would

be equivalent to annulling an act of Congress deliberately enacted limiting disposal of non-mineral Siletz lands to townsite and homestead entry only. No more cultivation can be required than is reasonably possible during the time of the entry under the conditions existing. Actual residence and such cultivation as is practicable establishes the settler's good faith. If the entry were canceled contestant could only take a homestead entry and suspicion of his bad faith would immediately arise if that were imputable from the mere fact of the forested condition of the land.

You did not pass upon Grant's commutation proof. Its sufficiency is not before the Department. Your decision is reversed, the contest is dismissed and the papers are remanded for such action upon the commutation proof as may be appropriate. In this connection see *Adams v. Coates* (38 L. D., 179).

DESERT LAND ENTRY WITHIN RECLAMATION PROJECT—WATER
RIGHT—PATENT.

LEROY W. FURNAS.

Final certificate and patent will not issue upon a desert land entry within a reclamation project until all payments for a water right under such project have been made and the water right permanently attaches to the land.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, September 13, 1909.* (E. L. C.)

Leroy W. Furnas has appealed from your office decision of March 1, 1909, in which you affirm the action of the local officers and refuse to issue final certificate or patent for his desert land entry No. 413, made April 12, 1904, for the NE. $\frac{1}{4}$, Sec. 10, T. 4 N., R. 28 E., La Grande, Oregon, land district.

It appears from the record that the tract involved is within the Umatilla reclamation project, and upon his application for water right a certificate was issued as for land in private ownership (See Instructions, 34 L. D., 29), under section 5 of the act of June 17, 1902 (32 Stat., 388), which is as follows:

No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one land owner, and no such sale shall be made to any land owner unless he be an actual *bona fide* resident on such land, or occupant thereof, residing in the neighborhood of said land, and no such right shall *permanently attach until all payments therefor are made.*

It is plain from the section just quoted that it was the intention of Congress to require all those owning land within any irrigation project of the Government to fully pay for the water right before

they could have any permanent water right which would attach to the land. Section 4 of the same act provides that—

Upon determination by the Secretary of the Interior that any irrigation project is practical . . . he shall give public notice of the lands irrigable under said project . . . also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual instalments, not exceeding ten, in which such charges shall be paid, and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably.

It does not appear that the entryman has made all of the water right payments, and the question is as to whether or not he is entitled to patent before all such payments have been made.

Section 5 of the act of June 27, 1906 (34 Stat., 520), provides:

That where any *bona fide* desert land entry has been or may be embraced within the exterior limits of any land withdrawal or irrigation project under the act entitled "An act appropriating the receipts from the sale and disposal of public lands in certain states and territories to the construction of irrigation works for the reclamation of arid lands," approved June 17, 1902, and . . . *Provided*, That if after investigation the irrigation project has been or may be abandoned by the Government, time for compliance with the desert land laws by any such entryman shall begin to run from the date of notice of such abandonment of the project and the restoration to the public domain of the lands withdrawn in connection therewith, and credit shall be allowed for all expenditures and improvements heretofore made on any such desert land entry, of which proof has been filed; *but if the reclamation project is carried to completion so as to make available a water supply for the land embraced in any such desert land entry, the entryman shall thereupon comply with all the provisions of the aforesaid act of June 17, 1902, and shall relinquish all land embraced within his desert land entry in excess of 160 acres, and as to such 160 acres retained, he shall be entitled to make final proof and obtain patent upon compliance with the terms of payment prescribed in said act of June 17, 1902, and not otherwise.*

From the language of the above act, it is clear that the entryman is not entitled to a patent until he has made the payments prescribed by the act of June 17, 1902. Counsel for appellant concede this point, but contend that in the present case the entryman has fully complied with the terms of payment prescribed in said act, their contention being set forth in their brief as follows:

This does not necessarily mean that the actual cash has been paid the Government but, in our opinion, it should be construed to mean that the entryman has done all the law requires him to do in respect of such payments at the time the final proof is submitted, and if he has done this he is entitled to patent.

Or, in other words, if the entryman has made all the payments accruing up to the time he submits final proof he is entitled to patent.

This contention cannot be sustained. The desert land law contemplates that before an entryman shall receive his patent he shall be the owner of a water right which is sufficient to irrigate the land

embraced in his said entry. In the present case, the entryman is not the owner of such a water right. While it is true that entryman has a certificate which entitles him to the use of water to irrigate his land, yet this certificate may be forfeited upon his failure to make the future payments as they become due; and no permanent water right attaches to the entry until these payments are fully made; it follows, therefore, that the entryman is not entitled to final certificate or patent until all water-right payments have been made and said water right permanently attaches to the land. Said final proof being otherwise sufficient, is accepted as showing satisfactory compliance with the requirements of the desert land law. No final certificate will issue, however, until entryman has complied with the additional requirements of the act of June 17, 1902, *supra*, in the matter of making water-right payments.

Your decision is correct, and the same is accordingly hereby affirmed.

DISPOSAL OF LANDS IN RUSH LAKE VALLEY ABANDONED MILITARY RESERVATION.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 14, 1909.

REGISTER AND RECEIVER,
Salt Lake City, Utah.

SIRS: The Rush Lake Valley Abandoned Military Reservation comprises land in Ts. 4 and 5 S., R. 5 W. It was turned over to this Department for disposition by the War Department on July 22, 1884. Including the lake bed, which has been surveyed, there are 5,061.10 acres of land in the reservation. Patents have issued to homestead entrymen for 1,274.73 acres, and 242.50 acres are included in grants to the State for school purposes.

The appraisal of the reservation has been approved by the Secretary of the Interior, and I inclose a copy of so much of the appraised list as shows the lands undisposed of.

There are still to be disposed of 3,543.87 acres, which have been appraised at prices ranging from \$2.50 to \$5.00 per acre, the total appraisement for the land being \$11,221.97, and in addition the fencing on certain tracts mentioned in the appraised list has been appraised; the total appraisement of the fencing on the undisposed of tracts being \$675. Persons who make homestead entries for the lands on which the fencing stands will be required to pay the appraised price thereof, as well as the price of the land.

Said undisposed of lands are subject to settlement and entry under the provisions of the act of August 23, 1894 (28 Stat., 491), and you will therefore allow homestead entries for said lands, indorsing on the application and your abstract the words "Rush Lake Valley reservation, act of August 23, 1894." Upon request of entrymen you will inform them at what rate per acre the lands entered by them have been appraised, as well as the appraised price of the fencing, if any.

Entrymen for these lands may commute their entries after fourteen months from the date of settlement, with full payment in cash; or after submitting ordinary five-year proof and after its acceptance, may pay for the land the full amount of the appraised value thereof, without interest, or may make payment in five equal instalments, the first instalment to be made one year after the acceptance of final proof, and subsequent payments to be made annually thereafter, interest to be charged at the rate of four per cent per annum from the date of the acceptance of the final proof until all payments are made.

In case the full amount is paid after fourteen months from date of settlement you will, if the proof is satisfactory, issue cash certificate and receipt; and in the event regular final proof is made and accompanied by full payment you will issue final certificate and receipt; but when partial payments are made the receiver will issue a receipt only, for the amount of principal and interest paid, and at the time the last payment is made will issue the final papers as in ordinary homestead entries. In issuing final papers you will make proper notations thereon, as well as on the abstracts, to show that the entry covers land in the Rush Lake Valley reservation.

The same ruling as to the allowance of credit for residence prior to entry and for military service applies to entries under said act of August 23, 1894, as to other homestead entries.

Where, upon submitting final proofs, the entrymen elect to make payment for the lands entered in five annual installments, you will make the usual charges for reducing the testimony to writing, but as the final certificate and receipt cannot be issued until the last payment is made, you cannot charge the final commissions until said final certificate and receipt are issued.

Where the entrymen submit final proofs and elect to pay for the lands in installments you will, if the proofs are acceptable to you, make proper notes on your records showing that satisfactory proof has been made and the dates upon which the partial payments must be made and will then transmit the proof to this office for filing with the original entries.

There are no guarantees to be taken in order to secure the payments of the installments but if, when each installment is due, any

entryman fails to pay the same you will report the matter to this office for action.

On February 15, 1900 (29 L. D., 501), the Department held that lands within an abandoned military reservation, opened to disposal under the act of August 23, 1894, are subject to townsite entry under the provisions of section 2387, R. S., the lands when so entered to be paid for at the appraised price. The appraised list shows that lot 1, Sec. 24, T. 4 S., R. 5 W., is within the limits of the town of Stockton.

The disposal of lot 1, Sec. 24, lot 7, Sec. 25, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 26, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 35, T. 4 S., R. 5 W., and lots 7, 8, 9, and NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 10, T. 5 S., R. 5 W., is subject to the right of way of the Oregon Short Line Railroad Company; and the disposal of lot 5, Sec. 25, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, W. $\frac{1}{2}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 35, T. 4 S., R. 5 W., and NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and lots 6, 7, 8, 9, 10, Sec. 10, T. 5 S., R. 5 W., is subject to the right of way of the Salt Lake and Deep Creek Railway Company.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

FRANK PIERCE,
Acting Secretary.

RELINQUISHMENT PENDING GOVERNMENT PROCEEDINGS—
MORTGAGEE OR TRANSFeree—APPLICATION.

HENRY GIMBEL ET AL.

Where proceedings are instituted by the government against a final entry which has been mortgaged or transferred, and during the pendency of such proceedings the entryman files a relinquishment, the entry should not be canceled until final decision upon the rights of the mortgagee or transferee, and no application to enter the land should be received until the pending proceedings have been disposed of and the entry formally canceled upon the records of the local office.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, September 15, 1909.* (J. H. T.)

April 26, 1902, Henry Gimbel made homestead entry for the SW. $\frac{1}{4}$, Sec. 8, T. 147 N., R. 73 W., 5th P. M., Bismarck, North Dakota, land district. Commutation proof was submitted March 18, 1904, and cash certificate issued thereon April 25, 1904.

Adverse report by a special agent was made on said entry, and by your office letter "P" of May 16, 1905, it was directed that hearing be ordered upon the following charge:

That claimant never established a *bona fide* residence on the land, but lived with his father near Harvey, North Dakota, and made occasional visits to the

land; that the house was not habitable, and that prior to making proof he executed the following mortgages against the land:

December 14, 1903, to Sayre Strong Grain & Mercantile Co., \$292.00; December 28, 1903, to W. H. Bashaw, \$400.00; December 28, 1903, to J. W. Shelby, \$60.00; December 31, 1903, to Sayre Strong Grain and Mercantile Co., \$272.00; January 2, 1904, to Adam Lesmeister, \$150.00; and that subsequent to proof, he executed three other mortgages.

The entryman and the mortgagees were notified of the charges, and hearing was duly had thereon; and on July 22, 1908, the local officers rendered their decision holding that—

Claimant wholly failed to establish and maintain *bona fide* residence on the land in question. No evidence of intention of fraud is discovered, and we recommend the rejection of the proof and that the entry be held intact subject to future compliance with law.

August 29, 1908, the local officers transmitted the record to your office, together with a relinquishment executed by Gimbel and filed in the local office August 28, 1908, and reported that they had canceled the entry on the relinquishment. They also reported that at the time the relinquishment was filed, Edward Hannemann made homestead application for the said land, and that they had suspended the application of Hannemann pending the determination of the case of the Government against Gimbel. And they further stated that "if we were to put this application to record, the rights of the different creditors of Gimbel would be jeopardized."

By your decision of March 22, 1909, you found that the evidence showed that Gimbel had failed to comply with the law, and you therefore held his entry for cancellation. You stated that—

Inasmuch as the record shows transfer subsequent to issuance of the cash papers, you should not have noted the entry as canceled upon the relinquishment by the entryman, not joined in by such transferees, as their showing was entitled to consideration before cancellation of the entry. Said entry not having been properly canceled when the application to enter was filed, the latter must be rejected.

Hannemann has appealed from that part of your decision which rejected his application. No appeal has been filed by Gimbel, or any of the mortgagees, and therefore as to them your decision is final.

Hannemann in his appeal insists that his application should be allowed, in view of the fact that Gimbel relinquished all of his interest in the land. He states that he is residing upon and improving the land as an actual *bona fide* homesteader.

It is well settled that where an entryman has transferred or mortgaged the land after receiving his final certificate, he will not be permitted to relinquish the same and thereby defeat the rights of the transferee or mortgagee. (Addison W. Hastie, 8 L. D., 618; Patrick H. McDonald, 13 L. D., 37; Richard F. Hafeman, 14 L. D., 644; Harlan P. Allen, 14 L. D., 224; Paul v. Wiseman, 21 L. D., 12.)

If it should be held that an entryman who has submitted final proof and has transferred or mortgaged the land, which appears of record in the local land office, has the right to relinquish the entry so as to clear the record for entry at once by another applicant, it would put into the hands of such entryman the power to victimize his transferee or mortgagee, although title to the land had been fully earned by compliance with law. The right of an entryman to transfer the land after satisfactory final proof is fully recognized. To recognize his right to relinquish such entry in the face of a record transfer or encumbrance, would permit him to sell his relinquishment and have the entry canceled thereon. The land would then be subject to entry. It might be entered by the person buying the relinquishment, with full knowledge of all the facts, in which case the latter entryman would be in no position to complain of any loss which might be incurred by the subsequent cancellation of his entry. But the land upon cancellation of the final entry by relinquishment might be entered by an innocent person, and great loss and injustice might be visited upon him if it were afterwards shown by the transferee or mortgagee that patent should issue upon the prior entry. There are, therefore, sufficient administrative reasons why the final entry should not be canceled under such circumstances until final decision is rendered upon the rights of the transferees or mortgagees; and no application to enter the land should be received until the pending proceedings have been disposed of, the entry formally ordered canceled and notation made thereof upon the local office records.

Furthermore, it cannot be known under such circumstances whether the entryman has any right to relinquish the entry until final decision is rendered, because if the law has been complied with, the transferees or mortgagees are entitled to have patent issued, even over the protest of the entryman. To accept and at once note such a relinquishment would be to decide adversely to the encumbrance claimants before proceeding to adjudicate their claims; to take action against them, and afterwards pass upon their rights. The record should remain *in statu quo* until final decision.

Gimbel's entry should not have been canceled upon his relinquishment under the circumstances, but the entry should stand or fall by judgment upon the evidence submitted. If the law was complied with, then patent should issue for the protection of the mortgagees.

The record clearly shows that Gimbel failed to comply with the homestead law, and therefore his entry will be canceled on the Government proceedings. Hannemann cannot be accorded any rights by reason of his pending application; but if, as alleged, he is a *bona fide* settler on the land, and if there is no other settler thereon, he

PROPERTY OF THE
GENERAL LAND OFFICE

will be protected provided he files application therefor within three months from date of cancellation of Gimbel's entry.

Your decision is affirmed.

HOMESTEAD ENTRY—QUALIFICATION OF ENTRYMAN—OWNERSHIP OF LAND.

REIBER *v.* STAUFFACHER.

One holding the naked legal title to a tract of land in which he has no beneficial interest but holds as mere dry trustee for another who paid the consideration therefor is not the proprietor thereof within the meaning of section 2289 of the Revised Statutes, declaring disqualified to make homestead entry one who is the proprietor of more than 160 acres of land in any State or Territory.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, September 15, 1909.* (J. R. W.)

Henry J. Stauffacher appealed from your decision of January 16, 1909, in contest of George Reiber, canceling Stauffacher's homestead entry for lots 1, 2, and S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 6, T. 8 N., R. 31 E., W. M., Walla Walla, Washington.

February 20, 1905, Stauffacher made entry which Reiber contested and April 9, 1907, by amended affidavit charged that Stauffacher at date of his entry was owner of six hundred and forty acres in California and that his entry was for benefit of himself and others with intent to convey title when acquired to such persons. Hearing was had in which both parties took part. April 29, 1908, the local office found defendant was owner of the land in California at date of his entry and recommended cancellation of the entry which you affirmed.

August, 1904, defendant signed a blank application to buy State lands at request of Henry B. Schindler, an uncle, who said it was in a deal. Defendant testified he was not sworn to it, and this is corroborated by the paper which shows different inks and handwriting. The paper was taken by the uncle to a notary who signed a jurat that it was sworn to before him. The uncle sent it to the State land office where, January 24, 1905, certificate of sale issued to defendant's name for Sec. 3, T. 20 S., R. 20 E., showing payment of \$322.80, one-fifth of sale price. January 19, 1906, balance was paid and State patent issued to defendant. Defendant claims to have known nothing of these things, paid nothing, knew nothing of it till after issue of patent, and has tendered return to the State of any right he has.

Contestant showed that October 2, 1905, defendant made a power of attorney to A. D. Schindler to act for him in forming a reclamation district as to "lands owned by me on which this power applied,"

describing Sec. 3, T. 20 S., R. 20 E. October 23, 1906, referring to State patent for that land, A. D. Schindler stated to defendant account of "expense to date of securing your patent, all of which I have advanced for you," to which Schindler asked defendant to answer in form furnished:

I have received your letter of 23rd inst., referring to my section of land in Tulare lake. This land has cost me considerably more than I expected, and I am afraid I will not be able to pay off the amount which you have advanced. I wish you could get some one to take it off my hands and relieve me of the debt. See what you can do; and do the best you can for me.

No evidence shows that defendant signed the answer asked. Contrary, it is shown that September 6, 1907, he filed suit in the Superior Court, Sacramento County, California, alleging that August 11, 1904, application was filed in the State land office for such land in his name to purchase the land for his sole use, but he never in fact made it and it was not for his own use that he signed the application, not knowing its contents, never swore to it, and his signature "was obtained by false and fraudulent representations as to its contents by persons who desired fraudulently to obtain patent to the land;" that the blank was filed and used "without knowledge or consent of plaintiff" and patent though issued was not delivered to or accepted by him but is not annulled; that he first learned the facts December, 1905, and at once tendered the State a deed executed by himself and wife, which the State Board refused though he had not otherwise conveyed or encumbered the land; that he had made a homestead entry and if the fraudulent State patent is not annulled his entry will be canceled; that June, 1907, he asked the Attorney-General in name of the State to sue to annul the patent, which he refused to do, wherefore he sued in his own behalf to protect his own interest and prayed cancellation of patent to him. Authentic copy of this petition under the court seal, October 22, 1907, is filed. This suit the court dismissed, as the State had not consented to be sued in such action.

The face of the record clearly shows that defendant was used as dupe or tool by his uncle or some one for whom the uncle acted to violate State law in obtaining title to section 3. Stauffacher paid no part of the purchase price nor are there any facts implying that the price was paid as a gift to him, or that the purchase was ever intended to be for his benefit. Disclaiming the transaction he sued for its annulment. The State and its Attorney-General refused to act for his relief or to vindicate the dignity of the State against which the fraud was perpetrated.

The question is whether Stauffacher was at time of his entry, February 20, 1905, "proprietor of more than one hundred and sixty acres of land in any State or Territory." If he was proprietor of section 3, the Tulare Lake land in California, he was disqualified to

make entry by section 2289, Revised Statutes. At that date there was outstanding a certificate of sale of section 3 to him by the State on which one-fifth of the purchase price had been paid and January 19, 1906, final payment was made and State patent issued in his name conveying title in fee.

What constitutes one proprietor of land within meaning of the law is well settled by decisions of the land department construing this act. One is not proprietor though he holds full legal title if he has no beneficial interest or right in the land greater than a mere security for payment of the purchase price (*Bickford v. McCloskey*, 31 L. D., 166; *Patterson v. Millwee*, 30 L. D., 370); or where he has no valid or enforceable right to acquire legal title (*Mathieson v. Colquhoun*, 36 L. D., 82). But one is proprietor within meaning of the law if he has complete valid right to legal title (*Gourley v. Countryman*, 27 L. D., 702); or if, without complete right to legal title, he has a valid and enforceable right to acquire legal title subject to defeat only by his own act or default (*Jacob J. Rehart*, 35 L. D., 615; *Smith v. Longpre*, 32 L. D., 226; *Leitch v. Moen*, 18 L. D., 397; *Boyce v. Burnett*, 16 L. D., 562; *Ole K. Bergan*, 7 L. D., 472; *Ware v. Bishop*, 2 L. D., 616). There is no reason to depart from this construction and it comports with the intent of the homestead acts, which is to enable those who are not owners of land to acquire homes. The object of the inhibition is to prevent those who own land from abuse of the public bounty by absorbing public lands to exclusion of its intended objects. By this construction the object of the law is kept in view and it is construed equitably to effectuate the intent of Congress.

Counsel for Stauffacher argue that as the State of California is sovereign no suit could lie on the contract of sale and its performance rested merely in its own good pleasure. Therefore, it is urged, he had no enforceable right to acquire title and was not proprietor of the land. This is derogatory to the dignity of the State to which, no less than to individuals, the intent to perform an obligation is imputed. It is not permissible to presume that the State will refuse to perform its contract. If it should do so, while no remedy may lie by suit for specific performance, there is remedy by appeal to the legislative body which could grant redress or could, in case of dispute as to the right, refer the matter to the courts or to some other tribunal. In view of the Department the effect of the contract of sale is not changed by lack of certain and speedy remedy for its enforcement. This point of argument is not sound.

The question then arises whether the entryman is owner of the land by the contract and patent. He clearly has no beneficial interest. He paid no part of the purchase price, nor are the facts such as imply that his uncle paid it as a gift to him or that the purchase was

ever intended to be for his benefit. Under such facts the title was vested in him merely as a dry trustee for benefit of the uncle from whom the whole consideration actually came and the entire beneficial estate, as a resulting trust, follows and goes with the real consideration. (Pomeroy Equity Jurisprudence, Section 1031.) The case is within the rule of *Bickford v. McCloskey*, *supra*.

It is suggested that this purchase by the uncle through Stauffacher was a fraud upon the State law and that entryman's participation in it bars him from benefit of the homestead law. There is no good ground for so holding. The State Land Board and the Attorney-General of the State were fully advised of the facts and invited by Stauffacher to sue for recovery of the title. The State is fully competent to vindicate its own dignity and it is neither the concern of the United States nor within its powers to vindicate the dignity of the State of California in cases where its own proper authorities fail or refuse to do so. Congress has no power to enact laws for punishment of offenses against a State, as, for instance, bribery at an election. (*James v. Bowman*, 190 U. S., 127, 142.) The State's powers are sufficient for vindication of its own dignity and to define and punish crimes or conspiracies against it. If it be content to retain the consideration paid by Schindler and to allow the title it granted to stand, doing nothing to vindicate its offended law, it is of no concern to the United States and all consequences follow the title as if freely granted. Stauffacher taking no beneficial interest, was in no sense proprietor of the land.

Your decision is therefore reversed and the contest is dismissed.

HOMESTEAD APPLICATION—FEES AND COMMISSIONS.

AL McCLELLAN.

An applicant to make homestead entry is not entitled to have the fees and commissions paid by him in connection with a prior rejected application applied in payment of the fees and commissions required in connection with his second application, but must tender therewith the requisite amount to cover fees and commissions.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, September 15, 1909.* (J. F. T.)

November 27, 1908, Al McClellan filed his homestead application (which was given serial number 0987) for the W. $\frac{1}{2}$ W. $\frac{1}{2}$, Sec. 4, T. 21 S., R. 46 E., W. M., Burns, Oregon, land district, and his said application was on that day rejected for conflict as to W. $\frac{1}{2}$ SW. $\frac{1}{4}$ of said Sec. 4 with homestead entry number 0642 of William A. Carter.

December 10, 1908, an application by McClellan to make homestead entry for the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 6, S. $\frac{1}{2}$ NW. $\frac{1}{4}$ and lot 3, Sec. 5, T. 21 S., R. 46 E., W. M., was received by the local officers with the following letter:

OFFICE OF B. W. MULKEY
COUNTY CLERK MALHEUR COUNTY,
Vale, Oregon, Dec. 7th, 1908.

HON. WM. FARRE,
Burns, Oregon.

DEAR SIR: Herewith hand you Hd. Application of Al McClellan of Owyhee, Oregon, for the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 6, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, and lot 3, Sec. 5, T. 21 S., R. 46 E., W. M.

Mr. McClellan recently filed on a piece of land which was rejected, as you will observe by the attached letter. Am enclosing his receipt for the money which he tendered at that time, and request that you apply said funds in your possession to this application.

Yours truly,

(Signed) B. W. MULKEY, Clerk.

Said application was on same day returned to B. W. Mulkey, the officer before whom it was executed, with the following letter:

Burns, Oregon, December 10, 1908.

B. W. MULKEY,
Vale, Oregon.

SIR: I return herewith homestead application of Al McClellan for the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 6, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, lot 3, Sec. 5, T. 21 S., R. 46 E., W. M., for the reason that it is not accompanied with the necessary funds. Before such application can be considered, it will be necessary for McClellan to waive his right of appeal from the decision of this office, dated November 27, 1908, rejecting his former application (Serial No. 0987). When this is done, the Receiver will issue his check for the return of the money tendered with said former application; but in no case can such money be applied directly to a new application.

Respectfully,

(Signed) WM. FARRE, Register.

December 22, 1908, at 9 a. m., the second application of McClellan (Number 01161) was returned to the local land office, accompanied with the necessary sum of money, together with waiver of right of appeal from the local officers' decision rejecting his former application, number 0987, and said application number 01161 was on that day rejected for conflict with desert-land entry number 01144 of Archie Sinclair, dated December 19, 1908, as to S. $\frac{1}{2}$ NW. $\frac{1}{4}$ and lot 3, said Sec. 5.

Upon appeal to your office, the action of the local officers in rejecting McClellan's homestead application 01161 was, by your decision of July 7, 1909, affirmed, and claimant has appealed to the Department.

Upon this appeal it is contended that McClellan's application must be considered as of the date it was first received by the local officers—

December 10, 1908, for the reason that such second application was virtually and effectively a waiver of his right of appeal from the rejection of his former application 0987, and that the return therewith of the receipt for the money tendered with the first application and request to apply said funds as a deposit of money with said second application was virtually and effectively a compliance with the law as to the deposit of money with said application in the sufficient amount of \$16.01, being the amount of the deposit with the first application.

This contention cannot be sustained. Section 7 of instructions to registers and receivers, approved June 10, 1908 (37 L. D., 46), provides that:

Applications, entries, proofs, etc., which are not accompanied by the money required by law or regulations to be tendered at the same time they are filed will not be . . . considered for the purpose of allowance or rejection.

By same instructions, section 24, it is provided that receivers of public moneys may receive only cash or currency or United States postal money orders under certain conditions, and that "Receivers must not accept or issue receipts for money tendered in any other form;" and by section 25 that "Receivers must issue receipts for the full amount of money tendered and retained at the time the money is tendered." By sections 29 and 30, same instructions, it is provided that money once received can be returned only by the official check of the receiver as receiver of public moneys. By your office instructions the receiver is permitted to retain money in his hands until time for appeal from rejection of an application or cancellation of an entry has expired, or the right of such appeal has been waived by the party entitled thereto. (See instructions to R. & H. March 1, 1909.)

It thus appears that the action of the local officers in connection with the applications of McClellan to make entry for the land in question was in accordance with departmental regulations, and that his order to apply the \$16.01 filed with his first application as a cash deposit with his second application could not, under departmental regulations, be complied with by the local officers. It follows that their return of the application 01161 to him December 10, 1908, was correct, and that your decision sustaining such action was in accordance with law and departmental instructions. It is contended that such instructions are harsh and technical, but this entire matter has had the careful consideration of the Department and such instructions are considered necessary to the orderly and safe transaction of the public business, and the Department therefore adheres thereto.

Your decision is accordingly affirmed.

OPENING OF FOREST LANDS—NOTICE TO PUBLISHERS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., September 16, 1909.

The act of June 11, 1906 (34 Stat., 233), requires that the opening of National Forest lands thereunder shall be advertised for not less than four weeks in one newspaper of general circulation published in the county in which the lands are situated, and the registers of the local land offices are instructed to designate such newspaper. The exception to the above is where no newspaper is published in the county where the land is situated, in which case the opening should be advertised in the newspaper nearest the land.

Therefore, publishers, before commencing publication of notices under the above-designated act, should determine whether their paper is the proper one in which to make such publication; if not, they should immediately return the notice to the register of the local land office so that publication may be ordered in the proper county and paper.

Publishers are hereby notified that if by mistake of Land Office officials, or for any reason, notices above described should erroneously be sent to them and they should publish the same, no compensation will be allowed therefor.

FRANK PIERCE,
Acting Secretary.

RIGHT OF WAY—RESERVOIR SITE—JURISDICTION OF LAND
DEPARTMENT.

ALLEN ET AL. *v.* DENVER POWER AND IRRIGATION CO.

Upon approval of an application for right of way for a reservoir site under the act of March 3, 1891, the jurisdiction of the Interior Department is lost, and any subsequent action looking to cancellation or annulment of the right of way for any reason whatever must be by direct action for that purpose in the courts.

The land department is without authority to approve an application for right of way under said act which conflicts to a material extent with a prior approved application under which vested rights have been acquired.

The five-year period fixed by the act of March 3, 1891, within which a reservoir under its provisions is required to be constructed to prevent forfeiture of the right of way, can not be extended by means of an amended application for the reservoir site.

Upon failure to construct within the five-year period, the land department may not, in the face of evidence showing that another is seeking to acquire the land for a legal purpose, waive the requirement of the statute with respect to forfeiture, but should recommend the institution of proceedings to have the right declared forfeited.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, September 20, 1909.* (S. W. W.)

This case involves the Denver Power and Irrigation Company's right of way for a reservoir which was approved by the Department June 20, 1901, under the provisions of the act of March 3, 1891 (26 Stat., 1095), and the act of May 11, 1898 (30 Stat., 404); also the claimed rights of C. P. Allen and J. E. Maloney by virtue of an application filed July 30, 1905, for the Two Forks Reservoir, and of William E. Bates, under an application filed June 22, 1907, for the High Line Reservoir, embracing lands in townships 7 and 8 south, range 70 west, Denver, Colorado, land district, and is before the Department on the appeals of Allen and Maloney and William E. Bates from your office decision of October 19, 1908, adhered to on review February 15, 1909, holding their applications for rejection and refusing to recommend the institution of proceedings looking to the annulment of the approved application of the Denver Power and Irrigation Company.

Upon the filing of the application by Allen and Maloney the same was found to overlap the site previously approved to the Denver Power and Irrigation Company, which for convenience will be hereafter designated simply as the Denver company, or the reservoir company, and considering the same your office, under date of November 3, 1906, returned the map and field notes of the Two Forks Reservoir for certain corrections, and at the same time informed the applicants of the conflict with the Denver company and also with certain railroad rights of way which had been previously approved, and Allen and Maloney were advised that before their application could be allowed it was incumbent upon them to show that the previous grants had been forfeited or relinquished. Certain representations having been made by Allen and Maloney relative to nonconstruction by certain of the railroad companies and by the Denver company, a rule was laid by your office upon the railroad companies to show cause why the rights of way granted were not forfeited by the act of June 26, 1906 (34 Stat., 482), on account of the nonconstruction of the railroads, and a similar rule was laid upon the Denver company to show cause why suit should not be instituted to declare its right of way forfeited, on account of nonconstruction of the reservoir within the statutory period.

Under this rule showing was made by the Colorado and Southern Railroad Company, as successors of certain of the other grantee railroad companies, to the effect that portions of its road had been constructed prior to the passage of the act of June 26, 1906, *supra*; and the Denver company attempted to show that it had been restrained by injunction from carrying on the work of construction of its reser-

voir and canals by the order of the district court of the city and county of Denver; that it had entered into condemnation proceedings against the railway company to acquire title to the disputed land covered by its right of way, which proceedings were delayed by negotiations for settlement. The Denver company also filed a protest against the allowance of Allen and Maloney's application for the Two Forks Reservoir, which was answered by the applicants and the matter was considered in your office letter of November 6, 1907, to the register and receiver, in which it was stated that the allegations made by the contending claimants were so conflicting that your office could not determine whether or not suit should be recommended to declare forfeited the grant made to the Denver company; that there might be equities in connection with the company's failure to construct which would be duly considered when properly presented; and, in order that your office might be properly advised in the premises, a hearing was ordered at which all parties were authorized to present such testimony as would enable the Department to reach an intelligent conclusion in the matter.

In the meantime the application of William E. Bates for the High Line Reservoir having been filed, the local office was directed to cite Bates to appear at the hearing to the end that he might present such evidence as he could in support of his claim.

The hearing was had before the local office at Denver during the month of May, 1908, at which all parties interested were represented and submitted evidence in support of their respective contentions, the record having been transmitted by the local office without recommendation.

Your office decision under consideration found from the testimony and exhibits that evidently little or no construction work had been done by the Denver company; that there was considerable clearing done at the original dam site and some excavating preparatory to driving a tunnel intended to conduct water from the North Fork of the Platte River to the reservoir, which was intended to be located on the South Fork of the Platte River, but as a matter of fact no dam was ever erected and at no time has any water been impounded in the reservoir site on account of any work done by the Denver company; that on November 20, 1907, the Denver company had filed maps and papers, comprising its application for right of way under the provisions of the same acts of Congress, for what is known as the Eagle Rock Reservoir, which was claimed to be an enlargement of the original application, the same embracing all of the lands included in the approved application and in addition thereto the dam site at a point lower down the river. Your office decision further found that the work actually done by the Denver company appeared to have been done prior to the approval of the company's map and that in

1899 the work was stopped by injunction proceedings initiated by the Colorado and Southern Railroad Company; that prior to that time the Denver company had expended about \$35,000, most of which was spent in making investigation of the water supply, the use that could be made of the water, and the feasibility of the project generally; that about that time the Denver company brought a suit to condemn so much of the right of way of the railway company as was necessary for the proper construction and enjoyment of the reservoir site, at which time the railroad company had not constructed any track on its right of way along the South Fork of the Platte River and only proceeded to do so after the Denver company had commenced work on its reservoir site, which conflicting operations had brought on the litigation, the railroad company having enjoined the reservoir company and the latter company having instituted condemnation proceedings against the former. It seems that the trial of the condemnation suit resulted in the district court in a decision against the Denver company, and on appeal the Supreme Court of the State reversed the decision of the trial court and sustained the claim of the reservoir company to the right of eminent domain over the railroad company's right of way.

It seems, however, that since the decision of the Supreme Court on July 5, 1902, when a petition for rehearing was denied, nothing has been done either with the condemnation suit or the injunction suit, both of which are still pending, although it is shown that negotiations had been had with a view to their settlement, the Denver company having entered into an arrangement with the railroad company whereby the tracks of the latter were to be raised by the reservoir company to such an extent that the construction of the reservoir and consequent damming up of the waters would not interfere with the business of the railroad company.

Not only have elaborate briefs been filed by counsel for the parties in interest but the case has also been orally argued at length before the Department, and it is admitted that each of the reservoir claims will interfere with the rights of the Colorado and Southern railroad and that some arrangement must be made with the railroad company before any one of the reservoirs can be constructed. It is further admitted that the application of Allen and Maloney, and also the application of Bates, conflicts materially with that of the Denver company and that the construction of either will prevent the construction of the other. However, it seems that some arrangement is possible whereby the reservoirs of Allen and Maloney and Bates may be constructed so that they will not interfere with one another, and there is, therefore, no practical conflict between those claims.

It is urged on behalf of the appellants that their applications may be properly approved subject to all valid existing rights notwith-

standing their conflict with the approved application of the Denver company, and such action is requested of the Department. Appellants urge, in any event, that proceedings should be instituted by the government to the end that the approved application of the Denver company should be declared forfeited for reason of failure to construct within the period of five years specified in the act under which the application was approved.

The Denver company maintains, on the other hand, that it was seriously interfered with in its endeavor to construct its reservoir within the time allowed by the statute, not only by the injunction proceedings instituted by the railroad company but also by reason of the fact that the conflicting application of Allen and Maloney was filed and that such opposing claims rendered it impossible for the promoters of the Denver company to float the bonds necessary to construct the reservoir, which involves the expenditure of millions of dollars.

The act of March 3, 1891, under which the Denver company's application was filed and approved, is very similar to the act of March 3, 1875 (18 Stat., 482), by which rights of way across the public lands are granted to railroad companies. Respecting this act of 1875 the Supreme Court has decided that after an application has been approved by the Secretary of the Interior, a vested right is acquired which can not be disturbed by any subsequent action of the Department; that with the approval the title passes, and with the title passes all authority or control of the executive department over the land and over the title which it has conveyed. See *Noble v. Union River Logging Railroad Co.* (147 U. S., 165).

Inasmuch as the act of 1891 is similar in its granting terms to the act of 1875, it would seem to follow that the same rule is applicable here, and that upon the approval of a right of way application the jurisdiction of the Interior Department is lost and that any subsequent action taken looking to the cancellation or annulment of the right of way for any reason whatever must be by direct action for that purpose. Such was, in effect, the holding of this Department in the case of *Deseret Irrigation Company* (33 L. D., 469), where it was said that the authority of the land department to declare the forfeiture of a right of way which has attached by virtue of the approval of the Secretary of the Interior, under the provisions of the act of 1891, is not believed to exist, but that in such cases resort must be had to the courts.

This being so, it follows that the land department may not properly approve an application subsequently filed which conflicts to a material extent with an approved application under which vested rights have been acquired. If the land department has lost jurisdiction of the land by reason of the previous approval, it certainly has no authority

to approve an application subsequently filed, in serious conflict therewith.

The Department has heretofore stated in connection with this case that the approval of a conflicting application does not operate as a declaration of forfeiture of the right of way previously granted (36 L. D., 490), and from this it may be inferred that jurisdiction exists to approve an application covering land included in a prior approval. Upon careful consideration, however, the Department concludes that it does not possess such jurisdiction.

Applying these observations to the case under consideration, it follows that the applications of Allen and Maloney and Bates were properly rejected by your office and your action in that regard must be affirmed; nor, in the event of ultimate cancellation or forfeiture of the Denver company's right of way can any rights be recognized in Allen and Maloney, or Bates, by reason of their having filed these applications. No legal rights can be acquired by an application presented for land over which the Department has no jurisdiction, and no equitable rights may be acquired by applicants because under the ruling of the Attorney-General of January 15, 1909, individuals are no longer permitted to use the name of the United States to prosecute suits to declare rights of way forfeited. The rejection of their applications, however, is without prejudice to the right of Allen and Maloney, or Bates, to make new applications in the event of the forfeiture of the Denver company's right, or to acquire such rights as they can by construction prior to the filing of paper applications.

Respecting the conclusion of your office upon the showing made by the Denver company, the Department finds that there is not sufficient ground upon which that conclusion can be based. The Denver company's application was approved June 20, 1901, and it appears from the record that previous thereto the same had been filed and work had been commenced. However, little or no progress has been made in the way of actual work. It is admitted by the testimony of the president of the company that of the \$100,000 or more spent upon the project not more than from three to five thousand dollars were expended for actual digging or construction. The company's claim that it was interfered with by the injunction proceedings instituted by the railroad company is probably true, because the issuance of an injunction necessarily stops construction work. The effect of this, however, is overcome when it is observed that after the decision was rendered by the Supreme Court holding that the reservoir company might properly condemn the railroad right of way under certain circumstances, no further action was taken to that end, and moreover, the Denver company's president admitted that in 1903 an arrangement was made with the railroad company whereby its tracks should be raised at the expense of the reservoir company, in which

event the railroad company would offer no objection to the construction of the reservoir. Notwithstanding, no more money has been spent by the Denver company in the way of actual construction. Moreover, it appears from the record that in the year 1907 the Denver company applied for a new site at which the dam should be constructed, thus materially enlarging the capacity of the proposed reservoir. It is not understood how the company can claim to be entitled to any extension of time by reason of this alleged amended filing. Certain it is, that the time allowed on the original application can not be extended by reason of the filing of an amended application; because if that could be done there would be no limit to the time that might be thus secured.

The Department after considering the entire matter is of the opinion that the failure of the Denver company to construct the reservoir not only within five years after the approval of its application but not even within seven or eight years thereafter, was not justified by any of the obstacles encountered by the company in its endeavor to perform the work, but rather because of the failure of the company to secure the necessary means by which the work might be accomplished. In the absence of any evidence showing the desire of others to secure similar rights involving the same lands, it may be that this Department might refuse to institute proceedings looking to a forfeiture of the right, but in the face of evidence clearly establishing the earnest desire of others, presumably qualified, to utilize the right for legal purposes, it is not believed that the Department can waive the requirement of the statute and refuse to recommend the institution of proceedings whereby the company's right may be declared forfeited.

Your decision is modified accordingly and the papers are returned herewith, to the end that the case may be prepared for submission to the Department of Justice with the recommendation that proceedings be instituted by the United States to have the right of way of the Denver Power and Irrigation Company in this behalf declared forfeited.

ROSEBUD INDIAN LANDS—PRICE OF LAND—ACT OF APRIL 23, 1904.

D. B. BOWERSOX.

The act of April 23, 1904, providing for the disposition of the Rosebud Indian lands, fixed the price of all lands entered or filed upon within the first three months after opening at four dollars per acre, those entered or filed upon during the second three months at three dollars per acre, and those entered or filed upon after the expiration of six months at two dollars and fifty cents per acre.

Held: That where a tract was entered during the first three months the price thereof was thereby fixed for all time at four dollars per acre, and

in event of cancellation of the entry it could not thereafter be again entered except upon payment of such price, regardless of whether the second entry was made during or after the expiration of the first three-month period.

First Assistant Secretary Pierce to the Commissioner of the General Land Office, September 20, 1909. (F. W. C.) (E. F. B.)

This appeal is filed by D. B. Bowersox from the decision of your office of August 11, 1909, denying his application for repayment of an alleged overcharge on commuted homestead entry of the SW. $\frac{1}{4}$, Sec. 21, T. 96, R. 73, Mitchell, South Dakota.

The land embraced in said entry is a part of the former Rosebud Indian reservation opened to entry and settlement August 8, 1904, by proclamation of May 13, 1904, made under authority of the act of April 23, 1904 (33 Stat., 254), which provided that the price of all lands entered or filed upon under the provisions of said act within *three months* after the same shall be opened to settlement and entry shall be *four dollars* per acre, one dollar per acre to be paid when the entry is made, and the balance in equal installments at stated periods. The price of lands entered or filed upon after the expiration of *three months* and *within six months* after the same shall be opened to settlement and entry, shall be *three dollars* per acre with the same requirement as to cash, and a similar provision as to credit upon the deferred payments. After the expiration of six months from the opening of said land to settlement and entry, the price was fixed at \$2.50 per acre with a requirement of fifty cents per acre cash, and provision was made for payment of the balance in equal installments at stated periods. The act provided that in case any entryman fails to make payment within the time stated, all rights in and to the land covered by such entry shall cease, the entry shall be cancelled and all payments theretofore made shall be forfeited.

The fixing of different prices for lands entered within different periods, and graduated according to the proximity or remoteness of the entry from date of opening of the reservation was designed to establish a relative valuation for all time of the land entered that would not be affected by the cancellation of the entry. Its disposal under a different entry made during a later period would be controlled by the price thus fixed, irrespective of the graduated price fixed for such period by the act. So that whether the land is disposed of under the original entry or under a later entry, however remote from the date of opening, its price is fixed by the valuation impressed upon it by the first entry and is not thereafter changed. [See Instructions, 10 L. D., 328.]

This land was entered by Michael Morrison September 1, 1904, within three months from the date of opening and its valuation was then fixed at \$4.00 per acre, which was not thereafter changed by the cancellation of said entry and the forfeiture of the \$1.00 per acre cash payment made at the time of said entry. That forfeiture did not inure to the benefit of a subsequent entryman.

July 17, 1905, appellant Bowersox made entry of said land, making cash payment of \$1.00 per acre. January 24, 1907, he paid the remaining \$3.00 per acre and received final certificate.

No overcharge was made upon said entry, and your decision denying his application for repayment is affirmed.

DESERT LAND ENTRY—EXTENSION OF TIME FOR PROOF—ANNUAL
EXPENDITURE—SEC. 3, ACT OF MARCH 28, 1908.

MARY E. NORTON.

Section 3 of the act of March 28, 1908, authorizing an extension of time for the submission of final proof upon desert land entries where by reason of unavoidable delay in the construction of the irrigating works the entryman is unable to make proof of reclamation and cultivation within the time fixed by statute, furnishes no authority for an extension of time to enable the entryman to submit proof of annual expenditures.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, September 23, 1909.* (O. W. L.)

Mary E. Norton has informally appealed from your office decision of May 12, 1909, rejecting her application for extension of time in which to make annual proof on her desert land entry No. 23, made April 4, 1906, at Phoenix, Arizona, for the NW. $\frac{1}{4}$, Sec. 9, T. 4 S., R. 4 W. With the original entry it was stated that the claimant intended to irrigate the land by water from the Gila River by means of a canal whose head was nine miles distant from the land. No annual proofs of expenditure appear to have been made. The material part of the application for extension of time reads:

It is now almost three years since the destruction of the canal in-take caused by the floods of the Gila river, which caused the river banks to cave and cut around our canal head. We have expended time and money trying to control it, but had to abandon it and go four miles higher up the river to get rock broken for the canal head.

The application was sworn to before a notary public for Maricopa county and the names of Henry Anderson and A. H. Stout appear as witnesses but without any statements as to the matters to which such witness testified. It cannot be ascertained from the application whether the witnesses are designed simply to identify the signature

of the claimant or corroborate her statements. Your office denied the application upon the ground that it should be executed before a legally-qualified officer and corroborated by at least two witnesses, and further that section 3, act of March 28, 1908 (35 Stat., 52), does not authorize an extension of time in which to make annual proof on a desert land entry.

In a letter to this Department, dated July 14, 1909, the claimant stated that she neglected to make annual proof notwithstanding the fact that in the construction of the canal and improvements on the land she had expended over \$3.00 per acre, due to the fact that she was under the impression that the law required water to be on the land at the time annual proof was made.

The instructions of November 30, 1908, relative to extensions of time under section 3 of the above act of March 28, 1908 (37 L. D., 312, 321), require that such application must be corroborated by two witnesses having personal knowledge of the facts. The present application does not conform to such regulations, as above pointed out. Section 3 of the act of March 28, 1908, reads:

That any entryman under the above acts who shall show to the satisfaction of the Commissioner of the General Land Office that he has in good faith complied with the terms, requirements, and provisions of said acts, but that because of some unavoidable delay in the construction of the irrigating works, intended to convey water to the said lands, he is, without fault on his part, unable to make proof of the reclamation and cultivation of said land, as required by said acts, shall, upon filing his affidavit with the land office in which said land is located, setting forth said facts, be allowed an additional period of not to exceed three years, within the discretion of the Commissioner of the General Land Office, within which to furnish proof as required by said acts, of the completion of said work.

The word acts, as contained in this section, refers to the acts of March 3, 1877, and March 3, 1891. The act of March 3, 1877 (19 Stat., 377), required a payment of twenty-five cents per acre and declaration that the entryman intended to reclaim a tract of desert land by conducting water upon the same at the time of making entry. It required final proof of the reclamation of the land to be made within three years after filing the declaration together with additional payment at that time of \$1.00 per acre. The requirements, as amended by the act of March 3, 1891 (26 Stat., 1095), prescribes that at the time of filing the declaration claimant should file a map showing the plan of the contemplated irrigation. It also requires expenditure of \$3.00 per acre in the necessary irrigation, reclamation and cultivation by means of main canals and branch ditches and in permanent improvements upon the land and in the purchase of water rights for irrigation of the same, such expenditure to be made at the rate of \$1.00 per acre each year after making the entry. At the end of the third year, the entryman must file a map or plan showing the

character and extent of the improvements made, which further required the cultivation of one-eighth of the land and extended the time for making satisfactory proof of the "reclamation and cultivation" to four years. Section 3 of the above act of March 28, 1908, extends its benefits to such entrymen who have complied with the terms, requirements and provisions of the desert land acts, such provisions as above pointed out including the expenditure of \$1.00 per acre per year in making permanent improvements upon the land. It extends the time for making proof of the reclamation and cultivation of the land. This is the same proof which is required by section 7 of the act of March 3, 1891. In other words, the intention of Congress was that entrymen who had complied with the desert land law in all other respects except that of reclaiming and cultivating the land, from which they were prevented by reason of unavoidable delay in construction of the irrigating works, should, in the discretion of the Commissioner of the General Land Office, be allowed an additional period of three years within which to make their final proof. The act, therefore, neither expressly or impliedly waives the requirement of the annual expenditure of \$1.00 per acre in the first three years of a desert land entry.

Your decision is therefore correct, but in view of the statement made that the claimant has already expended the necessary sum of \$3.00 per acre, you will permit her to make annual proofs, in the regular manner, of such expenditure, as required by circular of November 30, 1908 (37 L. D., 312), within sixty days from notice hereof.

NORTHERN PACIFIC GRANT—HOMESTEAD CLAIM OF RECORD AT THE
DATE OF DEFINITE LOCATION.

NORTHERN PACIFIC RY. CO. *v.* LOEBER.

A homestead entry of record at the date of the filing of the map of definite location of the Northern Pacific railroad defeats the operation of the grant as to the tract embraced in the homestead claim, notwithstanding the entryman was at that date in default and the lifetime of the entry had expired.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, September 23, 1909.* (G. B. G.)

This is a motion in behalf of the Northern Pacific Railway Company for re-review of departmental decision of June 2, 1909 (not reported), which affirmed your office decision of October 19, 1903, rejecting the company's listing of lot 4, Sec. 11, T. & N., R. 30 E., Walla Walla land district, Washington, per list No. 8, presented July 27, 1887.

July 20, 1909, this Department, considering a motion on behalf of the company for review of said decision, noted a decision of Judge Handford, in the District Court of the United States for the Western District of Washington, western division, in the case of *United States of America v. Northern Pacific Railroad Company et al.*, which was relied upon by the company in support of said motion. In its said decision, on review, the Department said:

A reading of this decision discloses that the facts upon which it was rendered are essentially different from those presented in the case now under consideration. In that case, while a homestead claim was being asserted to the land there involved at the date of the grant, the entry had been canceled and such cancellation noted upon the records of the local land office at the date of the definite location of the road. Said decision is not therefore controlling.

Upon the present motion it is urged that the Secretary's office failed to catch the import of the motion for review and the said decision of Judge Handford. It is admitted that land covered by a homestead claim asserted and of record at the date of the grant is excepted from the company's grant, irrespective of whether the entry became canceled of record prior to definite location or not, but it is said that the point in the case decided by Judge Handford is that whilst the homestead entry there involved was of record the claim was not being asserted at the date of the grant, and urged that under these conditions the court properly held that the mere record claim would not except the land when the proof showed the claimant to have abandoned the same, and it is pointed out that the only difference between the case decided by Judge Handford and the one now under consideration is that in the former there was an abandoned homestead claim of record at the date of the grant while in this case there was an expired homestead entry of record at the date of the definite location, and urged that manifestly, under the prevailing conditions, if the former state of facts did not except land from the grant there is no good reason why the same conditions as applicable to definite location should have any greater effect.

The decision of Judge Handford is not controlling. That decision may or may not be sound. In view of the rulings of the Supreme Court of the United States in cases involving the status of land at the definite location of the road under the grant to the Northern Pacific Railroad Company it will be time enough for this Department to give effect to Judge Handford's ruling when it shall have received the sanction of the court of last resort. Besides, the Department still maintains that whether there be an essential or important difference between the case decided by Judge Handford and the one here presented, there is at least such difference as would prevent the Department from accepting such ruling in the present state of adjudications upon the general subject.

A homestead claim made and filed in the district land office and subsisting of public record when the railway company's map of definite location was filed, defeats the operation of the grant. It is not material that the homestead claimant may have failed to comply with the conditions of the homestead laws and was in default at the date of the company's definite location of its road.

With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land it was excepted out of the grant as much as if in a deed it had been excluded from conveyance by metes and bounds. [Kansas Pacific Ry. Co. v. Dunmeyer, 113 U. S., 629, 644.]

This ruling was made in a case, it is true, where the time for the completion of the homestead entry had not expired, but the court in its discussion of the case gave no weight, and apparently attached no importance, to this circumstance. It is the fact of the claim being of record in the district land office at the date of the definite location of the company's road, which controlled the court in its conclusion that the land there involved was excepted from the company's grant.

The motion is denied.

APPLICATION FOR SURVEY BY STATE—SETTLEMENT CLAIM—HEIRS—
NATIONAL FOREST.

HEIRS OF IRWIN v. STATE OF IDAHO ET AL.

No such preferential right of selection is secured by the application of a State for the survey of lands under the act of August 18, 1894, as will prevent the inclusion of the lands within a National Forest; and such application does not constitute a "filing" or "entry" within the meaning of the excepting clause in the proclamation of May 29, 1905, establishing the Sawtooth, now Boise, National Forest.

Where the homestead right is initiated by settlement upon unsurveyed land under the act of May 14, 1880, and the homesteader dies prior to survey, having complied with the law to the date of his death, his heirs are entitled to complete the claim and acquire title; and where they continued to comply with the law and made application within three months after survey, their claim was such as excepted the land from the proclamation of May 29, 1905.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, September 23, 1909.* (S. W. W.)

This case involves the construction of the act of August 18, 1894 (28 Stat., 394), granting the preference right of selection to certain states, and also the third section of the act of May 14, 1880, relative to homestead settlement on unsurveyed lands, and is brought before the Department by the appeals of the State and Margaret B. Irwin Jones, on behalf of the heirs of James Irwin, from your office decision of February 13, 1909, holding for cancellation certain indemnity

school selections filed by the State, and denying the application of Jones for a hearing to determine the priority and validity of the settlement of her ancestor upon certain of the lands involved.

It appears that T. 9 N., R. 7 E., Boise land district, was surveyed in the field September 8th to October 11, 1906, and the plat thereof was approved March 28, 1908, and filed in the local land office September 28th following; that previous thereto, to wit, on May 13, 1905, the township was withdrawn under the said act of August 18, 1894, upon the application of the Governor of Idaho, and that by proclamation of May 29, 1905 (34 Stat., 3058), the township was embraced in the Sawtooth Forest Reserve, the name of which was subsequently changed to Boise National Forest.

It further appears that on June 27, 1908, William A. Ewing was allowed to make homestead entry No. 10981, Serial No. 538, embracing 43.7 acres described by metes and bounds, lying principally within lot 3 of Sec. 27 in said township, said land having been listed as agricultural per list 1263, and restored to entry May 21, 1908, under the act of June 11, 1906 (34 Stat., 233); that on December 15, 1908, Margaret B. Irwin Jones, claiming to be one of the heirs of James Irwin, deceased, filed homestead application on behalf of said heirs for lot 3 of Sec. 27, W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 34, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 33, said township, and on December 19, following, filed an affidavit alleging that James Irwin, who died on or about November 2, 1905, made settlement upon the land last described in the spring of 1900, at which time he erected the dwelling house thereon and performed other acts of improvement; that the said Irwin was a qualified homestead entryman and his settlement upon such land was made for the purpose and with the intent of making a home thereon; that having so established his residence and abode on such land he continued to occupy the same and reside thereon, improving and cultivating the land until the time of his death, the value of his improvements being \$250; that said Irwin was unmarried and at the time of his death his nearest surviving relatives were nephews and nieces, affiant being one of such heirs, and that subsequent to the death of the deceased settler, the land had been cultivated and improved continuously at the instance and on behalf of the heirs.

It further appears that November 12, 1908, the State filed school indemnity list, selecting the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, W. $\frac{1}{2}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 33, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, W. $\frac{1}{2}$ NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, W. $\frac{1}{2}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 34, in said township, aggregating 640 acres in lieu of Section 16, T. 9 N., R. 5 E. It thus appears that the claim of the heirs of Irwin conflicts with the State's claim only as to the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 34, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 33, and conflicts with the entry of Ewing as to lot 3 of Sec. 27.

Your office decision under consideration holds that the establishment of the forest reserve embracing the lands in question defeated the right of the State to make selection thereof, and the State was allowed by your decision sixty days in which to show why its selection should not be canceled, citing as authority the decision of the Department in the case of the State of Idaho decided July 21, 1906 (35 L. D., 52), where it was held that the survey of a township made upon application by a state under the act of 1894, *supra*, would not defeat the right of the government to temporarily withdraw the land with a view to its possible inclusion within a contemplated forest reserve.

Respecting the claim of the heirs of Irwin your decision holds that said heirs had no preference right by reason of the settlement upon unsurveyed land; that such a settler acquires no right or title which, in case of his death, will pass to his heirs at law, if residence on the land is not maintained until after the survey thereof, citing in support of your conclusion 29 L. D., 30, and 130 U. S., 232.

As stated above, both the heirs of Irwin and the State have appealed to the Department.

The State admits that previous rulings of the Department are adverse to its contentions in this case, but maintains that the questions involved have not been properly determined, and urges a reconsideration thereof.

It is claimed on behalf of the heirs of Irwin that by virtue of his settlement and residence, which was continuous to the time of his death, and by virtue of the cultivation by the heirs from the time of his death up to and after the filing of the plat of survey, a right was acquired under which the heirs are entitled to make homestead entry of the land, notwithstanding the inclusion of the lands in the National Forest and notwithstanding the intervening entry of Ewing.

In disposing of the State's claim it is sufficient to say that the question presented, or questions entirely similar, have been repeatedly determined by this Department and the courts. The preference right awarded the State by the act of 1894 seems to be in no way superior to the preference right awarded the successful contestant by the act of May 14, 1880, *supra*, and this Department has uniformly held that by the initiation of a contest under the act of 1880, no right is acquired by the contestant which would defeat the right of the government to make other disposition of the land and thus prevent the contestant from enjoying the fruits of his contest. (See 17 L. D., 149.)

The act of 1894 merely gives the State a preference right of selection over all other applicants, and in thus inviting the State to apply for the survey of lands whereby a preference right over others may be secured, the government in no way commits itself or agrees to withhold the lands from any disposition which it may find necessary to

make of the same. (See *Frisbie v. Whitney*, 9 Wall., 187; *Yosemite Valley case*, 15 Wall., 77; *Buxton v. Traver*, 130 U. S., 232.) The lands involved herein were included within the forest reserve prior to their survey, and of course before any attempt was made by the State to select the same. School indemnity selections are made subject to the approval of the Secretary of the Interior, and if, pending the State's application to select, the government under authority of law makes other disposition of the land, such disposition will defeat the State's claim. (See *State of Washington*, 36 L. D., 371, and cases cited.)

In a supplemental brief filed in behalf of the State, attention is called to the fact that in the order under which the lands were temporarily withdrawn with a view to their inclusion in the forest reserve, an exception was made in favor of the State, and its right to select under the act of 1894 was recognized. This is true, and if a similar provision had been contained in the President's proclamation by which the forest reserve was created, the State's right of selection could have been protected. However, the proclamation excepted from its operation, in addition to lands covered by settlement claims, only such "lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States land office," and an application for the survey of lands under the act of 1894, *supra*, has never been held to constitute a "filing" or an "entry."

Owing to the importance of the questions involved, in accordance with the State's earnest request, the matter was submitted to the Attorney-General, who decided in an opinion rendered September 15, 1909 (38 L. D., 224):

that the State of Idaho in the case presented has no such preferential right of selection secured by the application of the governor under the act of 1894, as will interfere with the right of the United States to include these lands within the forest reserve established by the proclamation of the President of May 29, 1905, issued prior to the survey and selection of such lands and necessarily prior to any application by the State for specific tracts.

It follows, therefore, that the State's selection must be canceled, and in promulgating this decision, a copy of the Attorney-General's opinion should be sent to the proper officers of the State for their information.

However, the Department can not approve of the disposition made by your office of the claim of the heirs of Irwin, and it is not believed that the decisions in the cases cited are controlling of the points involved herein. In the case of the Northern Pacific Railroad Company *et al. v. McCabe* (29 L. D., 30) the Department held that priority of settlement on unsurveyed land must be followed by the maintenance of residence and the timely assertion of right, to operate as

a bar to the acquisition of an adverse settlement claim. In that case the plat of survey was filed in the local office July 26, 1905, and it was not until April 11, 1906, that McCabe's application to enter was presented.

The case of *Buxton v. Traver*, *supra*, involved a pre-emption claim, and the circumstances under which the case arose all antedated the passage of the act of May 14, 1880, *supra*. Therefore, the views of the court entertained in that case do not apply to the case under consideration, but this case is rather controlled by the decision of the Supreme Court in the case of the St. Paul, Minneapolis and Manitoba Railway Company *v. Donohue* (210 U. S., 21). In that case the court said:

It was not until May 14, 1880 (21 Stat., 141), that a homestead entry was permitted to be made upon unsurveyed public land. The statute which operated this important change moreover modified the homestead law in an important particular. Thus, for the first time, both as to the surveyed and unsurveyed public lands, the right of the homestead settler was allowed to be initiated by and to arise from the act of settlement, and not from the record of the claim made in the Land Office.

If, therefore, the homestead right is initiated by settlement upon unsurveyed land, as was plainly held by the Supreme Court, and as under the general homestead law, where the homesteader dies prior to the acquisition of title, his heirs are granted the right to complete the claim and thus acquire title, it follows that the heirs of Irwin should be allowed an opportunity of proving the allegations contained in the affidavit filed in support of their claim.

It will be observed that the township plat was filed September 28, 1908, and on December 15, 1908, within the period allowed by the act of May 14, 1880, the homestead application on behalf of the heirs was presented to the local office. The proclamation of the President creating the Sawtooth National Forest excepted from the force and effect thereof all lands—

upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired, that this exception shall not continue to apply to any particular tract of land unless the entryman, settler, or claimant continues to comply with the law under which the entry, settlement, or filing was made.

Inasmuch as it is alleged that the settler fully complied with all the requirements of the law from the time of establishing residence on the land until the date of his death, and inasmuch as his heirs subsequent to his death continued to cultivate the land as required by the homestead act, and within three months of the filing of the plat of survey presented homestead application therefor, it is believed that this claim is within the exception contained in the President's proclamation aforesaid, and a hearing will be ordered by your office for the purpose of determining the facts.

The notice of the hearing should be delivered to Margaret B. Irwin Jones for service on Ewing, the homestead entryman, and the local office should inform the Forest Service of the time and place set for the hearing.

Your office decision is modified accordingly.

BOISE NATIONAL FOREST—PRESIDENT'S PROCLAMATION—INDEMNITY SCHOOL LANDS.

OPINION.

Where, on May 29, 1905, certain unsurveyed lands in Idaho were withdrawn upon application of the governor of that State, and fourteen days later the President, by proclamation, embraced the same lands in the Sawtooth Forest Reserve, afterwards known as the "Boise National Forest," and the lands in question were surveyed in October, 1906, and the plat of survey approved March 28, 1908, and filed in the district land office September 8, 1908, and where the governor, within sixty days of the filing of the plat of survey—to wit, on November 12, 1908—filed a list of indemnity school selections covering part of the lands in question, the State of Idaho has secured no such preferential right of selection under the act of August 18, 1894 (28 Stat., 394), as will interfere with the right of the United States to include the lands in question within the said forest reserve.

The withdrawal of these lands upon the application of the governor of Idaho for a survey of the lands under the act of August 18, 1894, did not operate to remove them from the jurisdiction of the United States by reason of the provision contained in the President's proclamation excepting from the effect thereof all lands which might have been, prior to the date of the proclamation, embraced in any legal entry or covered by any lawful filing duly of record.

DEPARTMENT OF JUSTICE,

September 15, 1909.

SIR: I am in receipt of your communication of the 9th instant, requesting an opinion respecting the right of the State of Idaho to select lands under the provisions of the act of August 18, 1894 (28 Stat., 394), after such lands had been reserved as a forest reserve by a proclamation of the President.

On May 13, 1905, certain unsurveyed lands in the Boise land district of Idaho were withdrawn, upon the application of the governor of the State.

On May 29, 1905, the same lands were, by a proclamation of the President, reserved and embraced in the Sawtooth Forest Reserve, the name being subsequently changed to the Boise National Forest.

Between September 8 and October 11, 1906, these lands were surveyed, and the plat of survey was approved March 28, 1908, and filed in the district land office September 8, 1908.

On November 12, 1908, and within sixty days of the date of the filing of the township plat of survey, the State of Idaho filed a list of indemnity school selections covering part of these lands.

The withdrawal and selection by the State was authorized by the act of August 18, 1894 (28 Stat., 394), as follows:

That it shall be lawful for the governors of the States of Washington, Idaho, Montana, North Dakota, South Dakota, and Wyoming to apply to the Commissioner of the General Land Office for the survey of any township or townships of public land then remaining unsurveyed in any of the several surveying districts, with a view to satisfy the public land grants made by the several acts admitting the said States into the Union to the extent of the full quantity of land called for thereby; and upon the application of said governors the Commissioner of the General Land Office shall proceed to immediately notify the surveyor-general of the application made by the governor of any of the said States of the application made for the withdrawal of said lands, and the surveyor-general shall proceed to have the survey or surveys so applied for made, as in the cases of surveys of public lands; and the lands that may be found to fall within the limits of such township or townships, as ascertained by the survey, shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise, except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office, during which period of sixty days the State may select any of such lands not embraced in any valid adverse claim, for the satisfaction of such grants, with the condition, however, that the governor of the State, within thirty days from the date of such filing of the application for survey, shall cause a notice to be published, which publication shall be continued for thirty days from the first publication, in some newspaper of general circulation in the vicinity of the lands likely to be embraced in such township or townships, giving notice to all parties interested of the fact of such application for survey and the exclusive right of selection by the State for the aforesaid period of sixty days as herein provided for; and after the expiration of such period of sixty days any lands which may remain unselected by the State, and not otherwise appropriated according to law, shall be subject to disposal under general laws as other public lands: *And provided further*, That the Commissioner of the General Land Office shall give notice immediately of the reservation of any township or townships to the local land office in which the land is situate of the withdrawal of such township or townships, for the purpose hereinbefore provided: *And provided further*, That the governors of the several States herein named are authorized to advance money from time to time for the survey of the townships withdrawn at such United States depository as may be designated by the Commissioner of the General Land Office, and the moneys so advanced shall be reimbursable. The foregoing provisions shall be applicable to Utah when admitted as a State into the Union and a governor is duly inaugurated and acting.

The proclamation of the President dated May 29, 1905 (34 Stat., 3058), authorized by the act of March 3, 1891 (26 Stat., 1103), is as follows:

Whereas it is provided by section twenty-four of the act of Congress, approved March third, eighteen hundred and ninety-one, entitled "An act to repeal timber-culture laws, and for other purposes," "That the President of the

United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof."

And whereas the public lands in the State of Idaho, within the limits herein-after described, are in part covered with timber, and it appears that the public good would be promoted by setting apart and reserving said lands as a public reservation:

Now, therefore, I, Theodore Roosevelt, President of the United States, by virtue of the power in me vested by section twenty-four of the aforesaid act of Congress, do hereby make known and proclaim that there are hereby reserved from entry or settlement and set apart as a public reservation all those certain tracts, pieces, or parcels of land lying and being situate in the State of Idaho, and within the boundaries particularly described as follows:

* * * * *

Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired: *Provided*, That this exception shall not continue to apply to any particular tract of land unless the entryman, settler, or claimant continues to comply with the law under which the entry, filing, or settlement was made.

The act of July 3, 1890 (26 Stat., 215), provided for the admission of Idaho into the Union and granted lands as follows:

SEC. 4. That sections numbered sixteen and thirty-six in every township of said State, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior.

SEC. 5. That all lands herein granted for educational purposes shall be disposed of only at public sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislature shall prescribe, be leased for periods of not more than five years, and such lands shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

The precise point to be decided is whether the withdrawal of these lands upon the application by the governor of the State for a survey of lands under the act of August 18, 1894, operates to remove such lands entirely from the jurisdiction of the United States by reason of the exception contained in the President's proclamation reserving these lands as a forest reserve.

It will be perceived, upon an examination of the statement of facts, that these lands were withdrawn in accordance with the governor's

application on May 13, 1905, and were reserved to the United States by the President's proclamation on May 29, 1905; but they were not surveyed until September, 1906, the approved plat was filed September 28, 1908, and the selection by the governor was not until November 12, 1908.

In the case of the State of Utah (33 L. D., 283, 358), decided October 24 and December 16, 1904, the Secretary of the Interior held that lands actually selected by the governor prior to the President's proclamation were excepted from the Government reservation and became the property of the State, but that a selection of lands made subsequent to the proclamation was ineffective and did not operate to except such lands from the reservation established by the proclamation. This decision was on the ground that the sole claim of the State to lands selected after the proclamation establishing the reservation to the United States rested upon the application of the governor for a survey of the land, whereas the only right intended to be conferred upon the State by the act of August 18, 1894, was simply one of preference over other intending claimants to unsurveyed public lands; and it was held that no such right followed the application as would interfere with the power of the United States to appropriate these lands to any use that Congress might direct.

The decision in the Utah case was followed in 1906 by a similar ruling in the case of the State of Idaho. (35 L. D., 52.)

The absolute right of the United States to withdraw lands from public entry and reserve the same for other purposes at any time before the final action required by law, has been frequently recognized by the Attorney-General. (17 Op., 160; 18 Op., 571.)

The principle involved in these decisions is illustrated in the case of *Campbell v. Jackson* (17 L. D., 417), wherein it was said that an application to enter land which is not subject to entry at the time, confers no right upon the applicant, and where a State applies for selection of lands granted to it, it must appear that such lands are subject to selection.

The question here presented seems not unlike that raised in the State of Washington, where it was held that the State acquired no rights in advance of the action of the Department in passing upon the selection made by the State. In that case it was said that until these matters had been determined the transaction was incomplete and no rights had been surrendered either by the State or the United States, and that no vested rights of the State had been destroyed, because the right of the State to select other lands than those reserved by the United States remained unimpaired. (36 L. D., 371.)

The Supreme Court has announced this general principle in a case where lands were granted to the State of Wisconsin to aid in the construction of railroads. The act of Congress provided for the selec-

tion of certain sections by an agent appointed by the governor, subject to the approval of the Secretary of the Interior, and the right of the railroad company to receive a patent to said lands was made to depend on certain conditions precedent, respecting construction, proof, and action by the Interior Department. The court held that when an official act prescribed by law remains to be done before a tract can be distinctly defined and before a patent can issue, the legal and equitable titles remain in the United States. In that case the court said:

The title conferred by the grant was necessarily an imperfect one, because, until the lands were identified by the definite location of the road, it could not be known what specific lands would be embraced in the sections named.

* * * * * *

For such lands no title could pass to the company not only until the selections were made by the agents of the State appointed by the governor but until such selections were approved by the Secretary of the Interior. The agent of the State made the selections, and they had been properly authenticated and forwarded to the Secretary of the Interior. But that officer never approved them . . . The approval of the Secretary was essential to the efficiency of the selections, and to give to the company any title to the lands selected . . . Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. [*Wisconsin Railroad Co. v. Price County*, 133 U. S., 496, 509, 511, 512.]

The position taken by the Interior Department is that the application of the State does not operate to bring its subsequent selection within the exception allowed in the President's proclamation, because such an application can not be held to be a "legal entry," a "lawful filing," or a "valid settlement." This view finds some support in the general rule announced in the case of *Buxton v. Traver* (130 U. S., 232), wherein it was held that except in special cases no portion of the public domain is open to sale until it has been surveyed and the approved plat has been returned to the local land office.

The Interior Department is charged with the execution of the laws pertaining to public lands. The Secretary of the Interior has construed the act of 1894, and his decisions respecting the rights of States and individuals under that and similar laws have been uniform and not contrary to the general principles stated by the courts.

It has been held by this office that where the construction of an act is doubtful, it is proper to resort to the construction which has been placed upon it by the Department charged with its execution (22 Op., 167, and cases there cited), and if such construction is long established, continuous and consistent, it will be regarded as conclusive. (21 Op., 408, 413; 26 Op., 403.) This is said to be a settled doctrine

in the Supreme Court. (United States *v.* Alabama Railroad, 142 U. S., 621.) I can see no reason for any departure from the rule fixed by the decisions referred to. But, independent of this rule, it is clear that the decisions are based on a reasonable construction of the statutes and a correct view of the law.

I am therefore of the opinion that the State of Idaho in the case presented has no such preferential right of selection secured by the application of the governor under the act of 1894 as will interfere with the right of the United States to include these lands within the forest reserve established by the proclamation of the President of May 29, 1905, issued prior to the survey and selection of such lands and necessarily prior to any application by the State for specific tracts.

Very respectfully,

WADE H. ELLIS,
Assistant to the Attorney-General.

Approved:

GEORGE W. WICKERSHAM.

The SECRETARY OF THE INTERIOR.

HOMESTEADS WITHIN RECLAMATION PROJECTS—RECLAMATION
PROOF—CONSTRUCTION CHARGES.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 17, 1909.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES.

SIRS: Section 5 of the act of June 17, 1902 (32 Stat., 388), provides that a homestead entryman on lands within irrigation projects shall, in addition to complying with the homestead laws, reclaim at least one-half of the irrigable area of his entry for agricultural purposes, and that before receiving patent for the lands he shall pay all charges apportioned against them as provided in section 4 of the act. You are accordingly instructed thereunder as follows:

1. *Notice of acceptance to issue on proof of residence, cultivation, improvement, and reclamation.*

Homesteaders who have resided on, and improved their lands for the time required by the homestead laws and have reclaimed at least one-half of the irrigable area of their farm units as required by the reclamation act, and have submitted proof which has been found satisfactory thereunder by this office, will be excused from further residence on their lands and notice will be issued to them reciting

that the conditions of residence, cultivation, improvement, and reclamation have been complied with, and that final certificate and patent will issue upon payment of the charges imposed by the public notice issued in pursuance of section 4 of the reclamation act. In such cases, upon payment of the charges by the entryman, or in his behalf, final certificate and patent will issue in due course.

2. Homesteads where residence and improvement have been completed but reclamation not effected.

Homesteaders who have resided on, cultivated, and improved their lands for the time required by the homestead laws and have submitted proof which has been found satisfactory thereunder by this office, but who are unable to furnish proof of reclamation because water has not been furnished to the lands or farm units not established, will be excused from further residence on their lands and will be given a notice reciting that further residence is not required, but that final certificate and patent will not issue until proof of reclamation of one-half of the irrigable area of the entry and payment of all charges imposed by the public notice issued in pursuance of section 4 of the reclamation act.

3. Full payment at option of entryman when residence, cultivation, improvement, and reclamation have been completed.

Upon proof of the residence, cultivation, improvement, and reclamation required by the homestead and reclamation laws, the parties in interest may, if so desired, exercise the option of immediately paying all installments of the building charges and the charges for operation and maintenance, whereupon final certificate and patent will be issued.

4. Notice under paragraph 1.

Notice will be given homesteaders by this office, through you, under section 1 of this circular; that is, in cases where farm units have been established and the required residence, cultivation, improvement, and reclamation have been established by proof submitted, in the following form:

4-331 a.

You are hereby advised that the five-year proof of residence, cultivation, improvement, and reclamation of one-half of the irrigable area, submitted by you on homestead entry No. _____ made _____, subject to the act of June 17, 1902 (32 Stat., 388), for the _____ Section _____, Township _____, Range _____, _____ Meridian, has been examined by this office and found to be sufficient as to residence, improvement, cultivation, and reclamation, as required by the homestead and reclamation laws. Further residence on the land is not required in order to obtain patent, and final certificate and patent will issue upon said entry upon payment to the receiver of the local land office of the charges, fees, and commissions due.

5. *Form of notice in cases falling within paragraph 2.*

Notice will be given by this office, through you, to homesteaders who have completed the five years' residence, cultivation, and improvement, but, because of the fact that water has not been furnished, or farm units established, are unable to furnish proof of the reclamation of their lands as described in paragraph 2 hereof, in the following form:

4-331.

You are advised that the five-year proof submitted by you on homestead entry No. _____, made _____, subject to the act of June 17, 1902 (32 Stat., 388), for the _____ Section _____, Township _____, Range _____, _____ Meridian, has been examined in this office and found to be sufficient as to the residence, cultivation, and improvement required by the ordinary provisions of the homestead law. Further residence on the land is not required in order to obtain patent, and final certificate and patent will issue upon proof that at least one-half of the irrigable area in the entry, as finally adjusted, has been reclaimed, and that all the charges, fees, and commissions due on account thereof have been paid to the proper receiving officer of the Government. If this entry does not conform to a farm unit as established by the Department, notice is hereby expressly given that the entry is subject to be conformed and its area thereby reduced.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

R. A. BALLINGER,
Secretary.

REPAYMENT-PURCHASE UNDER ACT OF JUNE 15, 1880-SECTION 2,
ACT OF MARCH 26, 1908.

SAMUEL M. QUAW.

The amount paid in making purchase under section 2 of the act of June 15, 1880, of a tract of land embraced in a second soldiers' additional entry canceled under the ruling, since changed, that one entry exhausted a soldiers' additional right, whether for the entire right or not, does not constitute an excess payment within the meaning of section 2 of the act of March 26, 1908, and repayment thereof can not be allowed.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, September 24, 1909.* (C. J. G.)

An appeal has been filed by Samuel M. Quaw from the decisions of your office of June 18 and August 2, 1909, denying his application, under section 2 of the act of March 26, 1908 (35 Stat., 48), for repayment of excess purchase money alleged to have been paid on cash entry made under section 2 of the act of June 15, 1880 (21 Stat.,

237), for the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 22, T. 40 N., R. 2 E., SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 18, and lot 3, Sec. 32, T. 42 N., R. 3 E., containing 107 acres, Wausau, Wisconsin.

The facts are that on October 7, 1868, one Ole Oleson made original homestead entry for forty acres; January 7, 1875, a soldiers' additional entry for 11.86 acres; and October 9, 1875, a second soldiers' additional entry for 107 acres as above described. This 107 acres was sold by Oleson July 20, 1876, to D. L. Quaw, who in turn sold the same October 31, 1878, to Samuel M. and William H. Quaw. The application for repayment is made by Samuel M. Quaw for himself and as administrator of the estate of William H. Quaw, deceased.

The second soldiers' additional entry of Oleson for 107 acres was canceled March 2, 1883, for illegality, under the construction of the soldiers' additional act then in force, namely, that one entry under said act exhausts the soldiers' right. Samuel M. and William H. Quaw were allowed to make cash entry for the land under section 2 of the act of June 15, 1880, *supra*, and patent issued to them June 7, 1883. The land being double minimum, the transferees paid therefor, under said act, at the rate of \$2.50 per acre.

Many years after the allowance of this purchase the Department reversed its previous ruling and held that an additional entry for an amount, added to that originally entered aggregating less than one hundred and sixty acres, did not exhaust the right granted under sections 2306 and 2307 of the Revised Statutes.

Because of this change it is now urged, in support of the present application, that the additional entry first allowed for the land purchased, was valid and should not have been canceled, and but for the erroneous action in canceling that entry, the purchase would have been unnecessary; that as a consequence the payment in support of the purchase was erroneously exacted and constitutes an overcharge within the meaning of section 2 of the act of March 26, 1908, *supra*, which provides:

That in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public-land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives.

It is sufficient to say that the additional entry was canceled—whether rightly or wrongly can not be found on this record and is not material to the disposition of the present application. The subsequent purchase was allowed because of the making of the additional entry, but under the law the purchase was not dependent upon the legality of the entry, the act of 1880 merely providing:

That persons who have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of those hav-

ing so entered for homesteads, may have been attempted to be transferred by *bona fide* instrument in writing, may entitle themselves to said lands by paying the government price therefor.

Had the entry been valid or invalid, the purchase might nevertheless have been made thereunder. The purchase was therefore clearly within this law, and there is no good ground for a claim that the payment made on account thereof was in excess of that lawfully collectible for like lands.

It is sought to becloud the issue by a reference to certain departmental decisions holding that such purchase rests upon and has its inception in the homestead entry which becomes merged into the higher and perfected title, but this affects only the question as to the right to make further additional entry, a matter not involved in the present appeal.

Upon careful consideration of the case it is the opinion of the Department that claimant is not entitled to repayment of the moneys, the consideration of the purchase under the act of 1880, under and on account of which the patent of the United States issued on this land.

Your office decision is therefore affirmed.

ADDITIONAL HOMESTEAD ENTRY WITHIN RECLAMATION WITHDRAWAL.

HENRY W. WILLIAMSON.

The fact that lands are within a reclamation withdrawal does not prevent additional entry thereof under section 2 of the act of April 28, 1904, where farm units have not been established and where the first original entry, to which the additional entry must be contiguous, was made subject to the restrictions and conditions of the reclamation act, the combined original and additional entry, however, being subject to adjustment to a farm unit when established.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, September 27, 1909.* (J. H. T.)

An appeal has been filed by Henry W. Williamson from the decision of your office of July 16, 1909, cancelling his homestead entry for the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, and lots 3 and 4, Sec. 20, and lot 1, Sec. 21, T. 1 S., R. 2 E., containing 105.80 acres, Phoenix, Arizona, land district, as additional to his original homestead entry made May 3, 1906, for the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 21, same township and range. You cancelled said additional homestead entry for the reason that—

the act of April 28, 1904 (33 Stat., 527), authorizing the making of additional homesteads, does not apply to lands included within a reclamation withdrawal, and, inasmuch as the lands included in said entry are subject to second form withdrawal under the act of June 17, 1902 (32 Stat., 388), the allowance of said additional entry was error, and the same is hereby cancelled.

In this case the first or original homestead entry was made subject to the restrictions and conditions of the reclamation act, and any homestead entry additional thereto would likewise be subject to the same restrictions and conditions. Had the original homestead entry been made before the land was placed within a reclamation project, a different condition would then have been presented, because such entry would not be subject to the restrictions and conditions prescribed in the reclamation act the same as had such original entry been made for lands without the project. (See Instructions, 38 L. D., 58.) Further, had farm units been established within the project prior to the filing of the application for the additional entry, the same should also have been denied, for the original entry as made must be adjusted to a farm unit, and no entry could be allowed after the establishment of the farm units, except for one farm unit. To allow the present additional entry to stand does not prejudice the rights of the government in carrying out the reclamation act, for both entries are liable to the same adjustment as had the entire tract been included in the first entry. On the other hand, should the scheme for any reason fail, the entryman will be protected in his full rights. In *ex parte* Archie M. Willis, decided July 30, 1909, not reported, it was said that: "It was held in the instructions of June 16, 1909 (38 L. D., 58), that additional homestead entries can not be allowed within reclamation projects." With respect thereto it is sufficient to say that the language above quoted was not necessary to the decision reached in that case and was, in its broadest application, a misconstruction of the instructions cited.

In accordance with the view herein expressed, your decision must be and is accordingly hereby reversed, and you will reinstate Williamson's additional homestead entry.

SOLDIERS ADDITIONAL RIGHT—ASSIGNMENT BY HEIRS.

WILLIAM D. KILPATRICK.

The soldiers' additional right of a deceased soldier is subject to distribution as part of his personal estate, and assignment thereof should be made by his executor, administrator, or devisee; but in case he dies intestate an assignment by his heirs will be recognized by the land department where it is shown by certificate of the proper probate court that there has been no administration of his estate and also by like certificate or other satisfactory evidence that the heirs making the assignment are the sole heirs of the soldier.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, September 27, 1909.* (O. W. L.)

William D. Kilpatrick, assignee of the heirs of James C. Miller, deceased, has appealed from your office decision of February 24,

1909, holding for rejection his application to enter, under sections 2306 and 2307, Revised Statutes, the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 4, T. 3 N., R. 18 E., Choctaw Meridian, Jackson, Mississippi, as assignee of the heirs of James C. Miller, who performed the requisite military service, and also made homestead entry No. 2097, Ionia, Michigan, April 20, 1866, for the E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 36, T. 19 N., R. 17 W.

The assignment was executed by Lillian Belle Keeler and Charles H. Keeler, her husband, and Emma Bunker, as the sole heirs of said Miller.

The assignment states that Miller died intestate, in the city of Indianapolis, State of Indiana, on or about the summer of 1871; that no administration had ever been had upon his estate, and it was not to the best interest of the heirs at law that an administration be now had; that his widow remarried November 2, 1873, and all the heirs are above twenty-one years of age; that the only heirs are his two daughters, viz., Emma Bunker and Lillian Belle Keeler.

Your office, by its decision of December 26, 1908, required satisfactory evidence of the date of the death of the soldier; his legal residence by county and state at the time of his death; record evidence of the court of the county where he had his last domicile that there had been no administration, also a finding by the judge of such court that the parties claiming as heirs were all the heirs, and that they were legally entitled to make the sale of the right.

In accordance with your requirements, the applicant filed a certificate reading as follows:

State of Indiana, County of -----

I, Leonard M. Quill, Clerk of Court of Probate in and for the County and State aforesaid, do hereby certify that the records of this office do not show that any estate of James C. Miller was ever administered upon.

(Signed) Leonard M. Quill.

Although the name of the county is left blank, the seal attached shows that Quill is the Clerk of the Probate Court of Marion County, Indiana.

In your decision of February 24, 1909, you required also a finding of the judge of that court that the parties claiming as heirs are all the heirs, and that they are legally entitled to make the sale of the right.

It is well established that upon the death of a soldier entitled to an additional right without exercise thereof, the right vests in his estate, subject to be divested, through exercise, by his unmarried widow or minor orphan children. In the event of their failure to so exercise the right, it may be assigned by the personal representative of the deceased soldier. The question therefore arises: Who is such personal representative, and what evidence will the land department require of that fact?

In the case of Williford Jenkins, 29 L. D., 510, the executor of the deceased soldier's estate is recognized to be his personal representative.

In the case of Julia A. Lawrence, 29 L. D., 658, it was held that a duplicate certificate of right should be issued to the personal representative of a deceased soldier, without specifically finding who such personal representative was.

In the case of Allen Laughlin, 31 L. D., 256, the Department declined to recognize an assignment made by all the adult heirs of the deceased entryman, but held that such assignment could be legally made only by her personal representative. This decision, however, was modified in the unreported case of Robert E. Sloan, assignee of the heirs of Alvin O. McCreery, decided June 30, 1902, wherein an assignment executed by all the heirs of the deceased soldier, accompanied by a certificate of the proper Probate Court that no administration of the deceased soldier's estate had been had, and that the assignors were all his heirs, was held sufficient.

In the case of David Werner, 32 L. D., 295, an assignment of additional right by all the heirs was sustained as against the subsequent assignment of the right made by an administrator of the soldier's estate appointed after the assignment by the heirs. In this case the assignment by the heirs had been corroborated by a certificate by the proper Probate Court, to the effect that no administration had been had on the soldier's estate, and that the assignors were the sole heirs of the deceased soldier.

In the case of Edgar A. Coffin, 33 L. D., 245, it was held that where, under the laws of Arkansas, there existed a proper procedure for ascertaining the heirs of the decedent and the disposition of the assets of such decedent by his heirs without a technical administration, an assignment by the sole heirs was invalid, in the absence of a showing of conditions dispensing with the ordinary procedure through administration of the estate under the laws of Arkansas.

In the case of John C. Mullery *et al.*, 34 L. D., 333, an assignment by the heirs of the deceased soldier, accompanied by probate evidence that his personal representative had waived his right to sell, and had obtained the approval by proper order of the court of the sale made by the heirs, was sustained.

An assignment by the devisee under the will of the deceased soldier was held to be valid in the case of Fidelo C. Sharp, 35 L. D., 164.

From the above cases it is apparent that the soldier's additional right is a part of the personal estate of the deceased soldier, and subject to distribution as such. Therefore it is preferable that the assignment should be made by either his executor, administrator or devisee. However, where the soldier dies intestate, and there has been no administration of his estate, the Department will recognize an assignment by all the heirs of the deceased soldier, but the fact that there has been no administration of his estate should first be shown by certificate of the proper Probate Court. Such finding

may also properly be accompanied by a finding of the Probate Court to the effect that the assignors are the sole heirs of the deceased soldier. Such a finding, however, is merely a matter of evidence, and is not absolutely indispensable. Proof of that fact could also be made by the affidavits of disinterested parties having knowledge of the facts.

In the present case, it will be noted that the record fails to show affirmatively that Miller was a resident of the city of Indianapolis at the time of his death. It simply alleges that he died in that city, without disclosing the place of his residence. The certificate of the Clerk of the Probate Court is therefore valueless, as it fails to show whether Miller was a resident of that county or not.

Your decision is therefore affirmed, but the appellant should be allowed a reasonable time within which to comply with the requirements as above outlined.

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MOBILE AND GIRARD GRANT—HOMESTEAD CLAIM—ACT OF MARCH 4, 1907.

JOHN B. JACKSON.

Where the patent issued upon a homestead entry for lands within the limits of the grant in aid of the Mobile and Girard railroad was declared invalid by the courts, on the ground that the lands had passed to the railroad company under its grant, and the holder of the homestead title thereupon purchased the railroad title, a subsequent sale of the land by him conveyed every muniment of title he then possessed, but is not of itself evidence that he thereby intended also to dispose of his right to indemnity under the act of March 4, 1907, for loss of the homestead title, in the absence of positive proof that such was the intention.

The right to select lands under the act of March 4, 1907, as indemnity for loss of the homestead title, was intended for the benefit of the person who lost that title, whether the entryman himself or his transferee, and not for the benefit of a purchaser of an after-acquired title.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, September 29, 1909.* (E. F. B.)

By letter of August 6, 1909, you transmitted, in response to the order of the Department of May 5, 1909, granted upon petition for certiorari, the appeal of John B. Jackson, complaining of the decision of your office of October 2, 1908, rejecting his application to select lands under the act of March 4, 1907 (34 Stat., 1408), in lieu of the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 27, T. 11 N., R. 20 E., St. Stephens Meridian, Alabama, embraced in his homestead entry patented December 4, 1901, the title to which has failed.

This application is made under the following provision of said act:

or where any homestead entry has been made on lands granted by the Congress of the United States to the State of Alabama to aid in the construction of the

Mobile and Girard Railroad or the Tennessee and Coosa Railroad, which said lands lie opposite to and coterminous with those portions of either of said roads which were constructed prior to the passage of the forfeiture act of September twenty-ninth, eighteen hundred and ninety (Twenty-sixth Statutes, page four hundred and ninety-six), the title to which is asserted and claimed by the vendee or successor in interest of either of said railroad companies, such homesteader is hereby accorded the privilege of transferring his claim thus initiated under the homestead laws to any other nonmineral unappropriated public land subject to homestead entry, with full credit for the period of residence and for the improvements made upon his said homestead entry prior to the order of its cancellation, or prior to the passage of this act: *Provided*, That he has not forfeited or voluntarily abandoned his homestead claim and that his application for transfer is presented within one year from the date of the passage of this act.

The act has been construed by the Department in the regulations of April 11, 1907 (35 L. D., 502), as bringing within its operation homestead entries upon which patents have issued, as well as homestead entries *in fieri*.

To an intelligent understanding of the conditions that prompted the passage of the act and the purpose of its provisions, it is necessary to state that the grants therein referred to came within the provisions of the act of September 29, 1890 (26 Stat., 496), forfeiting lands not opposite to and coterminous with completed portions of the said road at the date of said act. The eighth section of the act provided that the Mobile and Girard Railroad Company shall be entitled to the quantity of land earned by the construction of its road from Girard to Troy, a distance of 84 miles, and that the Secretary of the Interior in making settlement and certifying to or for the benefit of said company the land earned thereby shall include therein all the lands sold, conveyed, or otherwise disposed of by said company, not to exceed the total amount earned as aforesaid.

All the available land within the limits of said grant, amounting to 504,167.11 acres, had been certified to the State and sold by the railroad company. As the company had only constructed a sufficient mileage to entitle it to 302,233.79 acres, and as the act authorized the Secretary of the Interior in making settlement to include lands sold and conveyed by the company, the adjustment was made without special reference to the location of the lands, so that some of the 200,000 and odd acres of unearned lands, including the land in question, lie opposite to and coterminous with that portion of the road which had been constructed prior to the date of the forfeiture act. The Department restored those lands to entry and Jackson made homestead entry of the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ of said section 27, upon which a patent was issued December 4, 1901.

Thereafter, the Van Kirk Land and Construction Company, asserting title under purchase from the railroad company, brought suit in the circuit court of Pike County, Alabama, against Jackson, hold-

ing under the homestead patent, to recover possession of said land. Judgment was rendered in favor of the company March 28, 1902.

The land recovered in that suit was afterwards levied upon as the property of the Van Kirk Land and Construction Company and George F. Moore purchased the same at a sheriff's sale.

August 2, 1902, Moore conveyed the land to Jackson by deed containing a special warranty against the acts of the grantor, the Van Kirk Company (railroad company's vendee), or any railroad company, the consideration being \$120.

October 24, 1903, Jackson conveyed the land to J. Randolph Brown by warranty deed for a nominal consideration of \$1.00, but subject to a mortgage to secure a loan of \$1200.

The title to said land was recovered under a ruling of the Supreme Court of Alabama in the case of *Van Kirk Land and Construction Co. v. Grier* (132 Ala., 348), that the title to lands included within the grant of the act of Congress of June 3, 1856, to aid in the construction of the Mobile and Girard Railroad which were opposite to and coterminous with that portion of the road constructed and in operation at the date of the forfeiture act of September 29, 1890, remained in the original grantee under said act or his vendee, and could not be divested by the act of the land department leaving it out of the allotment made by said department, although the grantee or his vendee had notice of such proceedings and took no appeal from his allotment, nor can the court be concluded by the land department's construction of said act.

Because of the failure of the homestead title to lands similarly situated, the act of February 24, 1905 (33 Stat., 813), was passed which, by the act of March 4, 1907, was amended by adding the provision above quoted.

This controversy grows out of your construction of the following paragraph of the regulations of April 11, 1907 (35 L. D., 502), for carrying into effect the provisions of said act:

Where any such homestead has passed to patent or to final entry and certificate, or to the submission of final proof entitling the claimant to final entry and certificate, and the homesteader has since died or sold or transferred and assigned his rights under such entry, the heirs of such deceased homesteader or his vendees, successors in interest, or assigns will be entitled to all the benefits of this act, the evident purpose thereof being to place the homesteader and those claiming under or through him in the same position as though his entry when originally made had been of public lands of the United States to which no adverse claim had been asserted under either of the railroad grants above mentioned.

Pursuant to such regulations Jackson filed an application to be allowed to select lands in lieu of the lands patented to him upon his homestead entry, the title to which had been recovered of him by the vendee of the railroad company. While that application was pend-

ing J. Randolph Brown filed a similar application claiming that he is entitled to make lieu selection under said act as the transferee of Jackson.

A rule was then served upon Jackson to show cause why his application should not be rejected and the application of Brown approved, and upon the coming in of Jackson's answer, his application was rejected and the application of Brown was approved upon the ground that—

when Jackson purchased the title or claim of George F. Moore, the claim under the Mobile and Girard railroad grant and the claim under the homestead entry merged in him, and it cannot now be presumed, after a lapse of several years, that the general warranty deed from Jackson to Brown did not convey both titles in the absence of a reservation of the homestead claim in said conveyance.

The error in that ruling is the misapplication of the doctrine of merger of estates to the title acquired by Jackson under his deed from Moore. Two estates did not meet in Jackson by that deed for the reason that whatever estate he might have acquired under his patent from the United States was completely extinguished by the judgment in the ejectment proceedings declaring the title to the land to be in the vendee of the railroad company under its grant. It was not an existing estate at the date of Jackson's purchase of the legal title acquired from the railroad company, and although the United States was the common source of title, Jackson and the railroad company were not holding under the same right but were claiming adversely to each other under a different claim of right. There is no room for the application of the doctrine of merger of estates to that transaction.

Furthermore, no presumption arises, either from lapse of time or from the general warranty in the deed from Jackson to Brown, that he intended to convey any right other than the title to the land. The presumption is to the contrary. The right given by the act of March 4, 1907, was intended as compensation for the loss of title, not as a muniment of title. At the time of the transaction between Jackson and Brown, the patent issued upon Jackson's homestead had been declared invalid, the title of the United States having previously passed to the railroad company under its grant. That transaction occurred more than three years prior to the act of March 4, 1907, and it does not appear that the granting of such rights was then contemplated. It is inconceivable how any presumption can arise of an intention to convey a right that may be acquired in the future, not as a muniment of the title but as compensation for a personal loss, in the absence of some evidence that the acquisition of such right was then contemplated and that it was to be conveyed by the deed for a consideration in addition to the price of the land. The warranty of

Jackson was a warranty of the title to the land and was not intended as a recognition of any right of compensation to the homesteader for the loss of his title as given by the act of March 4, 1907.

You also erred in construing the paragraph of the regulations above quoted as giving to the transferee of the homesteader the benefit of the act of March 4, 1907, irrespective of the time or character of his purchase. That paragraph was intended to imply that the benefit of the act was to be enjoyed by the person holding whatever title the homesteader had acquired under his entry at the time of the recovery of title by the railroad company or its vendee, whether such person be the entryman or his transferee. In other words, it was intended for the relief of the person who lost the title of the homesteader and not transferees who purchased an after-acquired title.

In the contract of sale Jackson could have agreed to assign to the purchaser, for the consideration paid, any assignable right that might thereafter be acquired from the United States as indemnity for the loss of title to the homestead entry, but it would require positive proof to establish the fact of such purchase, especially in view of the fact that at the time of the purchase Congress had not provided for the granting of such rights.

The deed from Jackson to Brown conveyed every muniment of title to the land that he possessed, but it is not evidence in itself of the sale of any other right that was not a muniment of or essential to that title. Nor does any presumption arise from the general warranty in the deed that it was intended to convey any right other than the title to the land. That must be established by other proof.

The only act relied upon as evidence of the conveyance of the right to indemnity for the loss of the homestead title was the delivery of the homestead papers at the time of the execution of the deed to the land, but that falls far short of proving that Jackson intended by such act to sell and transfer to Brown a right not then in existence.

It is not intended by this decision to preclude Brown or his transferees from showing by satisfactory proof that the contract for the purchase of the land and the consideration paid therefor was intended to convey any after-acquired right growing out of the homestead entry, provided he tenders such proof within a reasonable time after notice of this decision.

Your decision is reversed, and you will readjudicate the case under the construction herein given to the act of March 4, 1907, and the regulations of April 11, 1907.

MOBILE AND GIRARD GRANT—HOMESTEAD CLAIM—ACT OF MARCH 4, 1907.

GEORGE GRANTHAM.

Where the patent issued upon a homestead entry for lands within the limits of the grant in aid of the Mobile and Girard railroad, is declared invalid by the courts, on the ground that the lands had passed to the railroad company under its grant, and the person holding the homestead title thereafter acquires the railroad title, he is not required, as a condition to the right to select indemnity under the act of March 4, 1907, for loss of the homestead title, to relinquish or reconvey to the United States the title derived through the railroad company.

Where the homestead patent fails as to part of the land only, the person holding thereunder may select an equal quantity of land to compensate for the loss of that part, without being required to surrender to the United States the title to the remaining portion.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, September 29, 1909.* (E. F. B.)

Pursuant to the order of the Department of June 17, 1909, you transmitted the record in the matter of the application of George Grantham to relinquish the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 15, T. 11 N., R. 20 E., Montgomery, Alabama, and to be allowed to select an equal quantity of land in lieu thereof, under the provisions of the act of March 4, 1907 (34 Stat., 1408).

Grantham made entry of the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 15, T. 11 N., R. 30 E., St. Stephens Meridian, Montgomery, Alabama, which was patented November 28, 1900. The land embraced in said entry is within the limits of the grant to the State of Alabama, to aid in the construction of the Mobile and Girard railroad, and is opposite to and coterminous with that portion of the road which had been constructed and was in operation prior to the forfeiture act of September 29, 1890 (26 Stat., 496). It is also a part of the lands restored to entry by the Department under its adjustment of said grant.

Thereafter the Van Kirk Land and Construction Company, asserting title under its purchase from the railroad company, brought suit in the circuit court of Pike County, Alabama, against Grantham, holding under the homestead patent, to recover possession of the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of said section. Judgment was rendered in favor of the company March 28, 1902, following the ruling of the Supreme Court of Alabama in the case of Van Kirk Land and Construction Company v. Grier (132 Ala., 348). See also John B. Jackson, decided this day (38 L. D., 237).

The land recovered in that suit, to-wit, the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of said section, was afterwards levied upon as the property of the Van Kirk Land and Construction Company and George F. Moore purchased

the same at a sheriff's sale. Grantham purchased the land from Moore August 18, 1902, and on the same day executed a mortgage upon the said NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, in favor of Moore to secure the payment of \$50 purchase money. October 1, 1906, he executed a second mortgage to T. K. Brantley & Sons, covering the W. $\frac{1}{2}$ SW. $\frac{1}{4}$ of said section.

February 12, 1908, H. Spalding and Sons, as attorneys for George Grantham, filed in your office a relinquishment to the United States of all his right, title, claim, and interest in and to the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of said section 15, so far as the same was obtained under the patent issued upon his homestead entry, expressly retaining the title obtained by him through purchase from the vendee of the Mobile and Girard Railroad Company. The relinquishment was executed February 1, 1908, by George Grantham and his wife, Lizzie Grantham, before the judge of the probate court of Pike County, Alabama.

Said relinquishment was filed in conformity with the regulations of your office as a basis for the allowance of his right to make selection of other lands in lieu thereof under the act of March 4, 1907. He filed in support of it a corroborated affidavit, stating that he had not sold, contracted to sell, or encumbered the title which he acquired under said patent nor are there any judgments or liens that would affect his right as patentee, but that since purchasing said 40 acres of land from the vendee of the railroad company, he had executed a mortgage for the purchase money, conveying thereby only the rights acquired under such deed from said vendee and had executed another mortgage to T. K. Brantley & Sons, conveying only his right as a purchaser from the vendee of the railroad company; that prior to said purchase, August 18, 1902, he had not sold or encumbered the title to said land or made any contract of sale. He appended a certificate from the probate judge of Pike County, dated February 1, 1908; that there are no unsatisfied debts or encumbrances of record "emanating" from George Grantham affecting the title to said NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, section 15, executed prior to his purchase from the vendee of the railroad company.

He also submitted a certified copy of the judgment of the circuit court of Pike County, Alabama, in the suit of the Van Kirk Land and Construction Company against George Grantham, dated March 28, 1902, adjudging the right to the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, said section 15, to be in the plaintiff; also certificate from the proper authorities that there are no other proceedings pending or judgments in said court affecting the title to said land and that the taxes have been paid.

The papers submitted were held to be defective in some unimportant particulars, but chiefly for the reason that the relinquishment covers only a portion of the entry, and that if Grantham is the owner of the remaining portion of the tract covered by his homestead patent,

to-wit, the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, he must file a "supplementary election to relinquish as to said tract, accompanied by the required proof, or his vendee or transferee must join with him in a proper election under said act, relinquishing said SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, or they may file a joint election to retain the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, the entire tract covered by said entry."

Appellant was given sixty days in which to comply with the requirements of your office and, in the event of his failure to do so, it was stated his relinquishment would be rejected.

In response thereto Messrs. Spalding and Sons, as attorneys for Grantham, stated in substance that their client was only ejected from the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ and no suit was brought against him as to the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, and there is no reason why he should relinquish that tract to the Government, nor is he willing, even if he would be allowed to do so under the provisions of said act; that he is the person who lost by failure of the homestead title and having purchased the outstanding title he is the only person interested in relinquishing; that the mortgages to Moore and to Brantley & Sons were based upon the title acquired from the vendee of the railroad company, and there is no reason why those parties should be consulted in the matter of the relinquishment.

Your office by letter of June 16, 1908, held that the proofs submitted not being sufficient to entitle Grantham to the benefits of the act of March 4, 1907, his application to relinquish the portion of the tract recovered of him by the vendee of the railroad company, with a view to the allowance of his right to select other land, was rejected.

The filing of a relinquishment to the United States of the tract entered, and of proofs showing that the land relinquished has not been sold, contracted to be sold, or encumbered and that it is free from liability for taxes, pending suits, judgment liens, or other encumbrances, required by the regulations of April 11, 1907 (35 L. D., 502), are material and necessary for the protection of the United States only in cases where it is necessary that the United States shall be reinvested with the title to the land entered for the purpose of carrying out some provision of the act—as when the homesteader desires to retain the tract entered and the holder of the title acquired under the railroad grant shall for that purpose relinquish or reconvey to the United States the title to such land and accept in consideration therefor the right to select an equal quantity of unappropriated public lands in lieu thereof. In such cases, the homesteader or his vendee holds the title acquired upon the homestead entry. But where, as in this case, the title of the United States acquired under the homestead entry has failed in a suit brought by the vendee of the railroad company holding under a prior title from the United States, and the homesteader or his vendee has acquired the title of the railroad com-

pany and the right to select other lands as compensation for the loss of his homestead title, he should not be required to make any relinquishment or reconveyance of the land to the United States, as it was not contemplated in such cases that the United States should again be invested with the title, and hence there can be no object in satisfying it that the land had not been encumbered. No confirmation or other title was given by the United States in such transactions, but compensation for the loss of title. Hence, no relinquishment should be required, except of all claim of right against the United States on account of loss of title.

Nor is there any valid objection to the allowance of an application by Grantham to select under the act of March 4, 1907, an equal quantity of land to compensate for the loss sustained by his failure of title to the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of said section without being required to relinquish the remaining portion of the land. He has not been disturbed in his possession of the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, and may not be. There is no reason why he should relinquish it in order to obtain compensation for that portion of the tract as to which his title has failed.

There are only two important facts that need be established in order to entitle the applicant to the benefits of the act, in all cases where the homesteader or his vendee has acquired title from the railroad company in such manner as to entitle him to make selection of lands as compensation for the homestead title that has failed:

First. That the title acquired under the homestead patent has failed and been extinguished by the judgment in favor of the railroad company or its vendee holding under a prior and superior title.

Second. That the applicant was the owner under the homestead patent at the date of the failure of such title, and that he has not since transferred his right to indemnity under the act of March 4, 1907.

Your decision is reversed and you will act upon the application of Grantham in accordance with the views announced herein.

COAL LAND—SURFACE RIGHTS—ELECTION BY STATE—ACT OF MARCH 3, 1909.

STATE OF UTAH.

The term "person" as employed in the act of March 3, 1909, includes a State; and where lands embraced in a State selection are subsequently classified as coal, the State is entitled to the right of election provided by that act.

First Assistant Secretary Pierce to the Commissioner of the General (F. W. C.) Land Office, September 29, 1909. (S. W. W.)

The Department has considered your office letter of September 22, 1909, submitting for approval, with a reservation to the United

States as provided by the act of March 3, 1909 (35 Stat., 844), Clear List No. 10 of selections by the State of Utah, under its grant for public buildings, embracing 160 acres in the Salt Lake City land district.

It appears from your said letter that the tracts described in the list were selected by the State June 20, 1904; that they were withdrawn under the coal land laws October 15, 1906; and on February 2, 1909, were classified as coal lands at \$15.00 per acre. It further appears that the State has filed its election, through its Board of Land Commissioners, to accept title to the lands exclusive of the coal deposits contained therein, in accordance with the provisions of the aforesaid act of March 3, 1909, and your office recommends that the list be approved—

subject to any valid interfering rights existing at the date of selection and reserving to the United States all coal in the lands so selected, and to it, or to persons authorized by it, the right to prospect for, mine, and remove coal from the same upon compliance with the conditions of, and subject to, the limitations of the act of Congress above cited.

It appears that the State Board of Land Commissioners of Utah was created by the act of the State Legislature (See section 2325, Revised Statutes of Utah 1898), and that said board has—

the direction, management, and control of all lands heretofore or which may hereafter be granted to this State by the government, or otherwise, for any purpose whatever, except lands used and set apart for public purposes or occupied by public buildings, and shall have the power to sell or lease the same for the best interests of the State and in accordance with the provisions of this chapter and constitution of the State.

The act of March 3, 1909, *supra*, provides:

That any person who has in good faith located, selected or entered under the nonmineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal, may, if he shall so elect, and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same.

While a State is not included in the ordinary definition of the word "person," the Department is satisfied that as employed in this act the term does include a State. The Supreme Court, in construing the act of March 3, 1887 (24 Stat., 556), which names as beneficiaries "citizens of the United States," or "persons who have declared their intentions to become such citizens," held that—

Obviously in a remedial statute like this the term "citizens" is to be considered as including state corporations unless there be something beyond the mere use of the word to indicate an intent on the part of Congress to exclude them. [Ramsey v. Tacoma Land Co., 196 U. S., 360.]

Not only is there nothing in this act, which is manifestly a remedial statute, beyond the use of the word "person" to indicate that Congress intended to limit the provisions of the act to natural persons, but, on the contrary, by including "selections" as well as "entries" and "locations," it is apparent that the act was not intended to be limited to "persons" as distinguished from a State or any other corporation. The term "selection," as used in the land department, generally represents the filing or presentation of a claim by a State or a railroad company and is seldom used to indicate the claim of an individual, which is usually known as an "entry" or a "location," as the case may be.

In view of the foregoing, and inasmuch as it appears from the statute of the State of Utah above cited, that the Board of Land Commissioners has the direction, management, and control of the lands granted to the State by the government, and as said board has elected to accept patents for the surface rights of these lands, the list of selections has been approved, subject to the reservation contained in the act, and the same is returned herewith.

SCHOOL LANDS—SURVEY—NATIONAL FOREST—JURISDICTION OF LAND
DEPARTMENT.

STATE OF MONTANA.

The grant of sections 16 and 36 made to the State of Montana by the act of February 22, 1889, for school purposes, is a grant *in presenti*, but the right of the State thereunder does not attach to any particular tract of land until identified by survey; and where prior to such identification any section 16 or 36 is embraced in a national forest, the right of the State to that specific tract does not attach so long as the reservation continues, but the State is entitled to select indemnity therefor.

Acting Secretary Pierce to the Attorney-General of Montana, Sep-
(F. W. C.) *tember 30, 1909.* (S. W. W.)

I have received your letter of the 7th instant relative to a controversy which has arisen between officials of the State and officials of the United States Forest Service over a portion of section 36, township 32 north, range 19 west, at or near the station of Belton on the Great Northern Railway, in Flathead County, Montana.

It appears that this land was surveyed in the field between August 20 and 25, 1902, and the township plat, which was approved March 10, 1904, was filed in the local office October 17 of that year. Subsequently to the survey, but prior to the approval of the plat, the said land was by proclamation of June 9, 1903, made a part of the Lewis and Clarke National Forest.

It seems that on or about July 7, 1909, application was made to the State Board of Land Commissioners for the purchase of the south half of the northwest quarter of section 36, whereupon that tract, together with other lands in the same district, was offered for sale after due publication of notice; that on the day of the sale a representative of the Forest Service served written notice upon the assistant State land agent and others that the United States did not recognize the claim of the State of Montana to any portion of said section 36, and that no purchaser from the State would be allowed to take possession thereof; that notwithstanding such notice the land was sold on August 5, 1909, to L. C. Gilman, the highest bidder, who paid \$75.50 per acre therefor, and the sale was thereafter confirmed by the officers of the State; and that agents and employes of the Forest Service of the United States have taken possession of the land, proceeded to fence the same with a substantial fence, have ordered all persons off, and claimed the right and title thereto for the United States as against the State and all persons whomsoever.

You maintain that the title to this land is in the State under and by virtue of sections ten and eleven of the act of February 22, 1889 (25 Stat., 676), by which the State of Montana was admitted into the Union and which granted to the State sections numbered sixteen and thirty-six in every township for the support of common schools. It is submitted that the act admitting the State into the Union constituted a contract prescribing the conditions of admission, which were duly accepted by the State; that it also constituted a grant of lands *in presenti* which can not be subsequently changed or modified by legislation on the part of the government of the United States alone so as to deprive the State of vested rights.

You have submitted the matter to this Department under the belief that the Department has jurisdiction over the same and you desire that action be taken to vindicate the rights of the State, to the end that an appeal to the courts may be avoided.

In reply I have the honor to advise you that respecting the subject-matter of the controversy this Department is without jurisdiction and without authority to interfere in any manner whatever. If, as maintained by you, the land is not part of the national forest, within the limits of which it is included, it is because title has vested in the State. If, on the other hand, title has not vested in the State and the land was properly included in the national forest, it is no longer within the jurisdiction of this Department but is under the control of the Forest Service. Inasmuch, however, as you seem to desire the views of this Department upon the subject, and as the Department has heretofore in its adjudication of similar questions found it necessary to construe the laws involved, I shall inform you as to

the construction placed upon such laws together with a statement of the reasons therefor.

In making the grant of land to the State of Montana for the support of common schools, the act of February 22, 1889, *supra*, provided, in section ten thereof, that—

Upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of an act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands restored to, and become a part of, the public domain.

The foregoing section making the grant of school lands to the State is similar in many respects to previous legislation by Congress making school grants to other States, but the act in question contains a somewhat unusual provision in that section eleven declares:

And such lands shall not be subject to preemption, homestead, or any other entry under the land laws of the United States whether surveyed or unsurveyed, but shall be reserved for school purposes only.

It seems that the State relies upon the provision contained in section eleven, above quoted, under which it is claimed Congress plainly intended to reserve the particular sections named in the act to the State for the purpose specified, and that in view of that provision of the granting act Congress can not without the consent of the State make any other disposition of the land.

By the act of February 28, 1891 (26 Stat., 796), Congress amended sections 2275 and 2276 of the Revised Statutes, which relate to the school grants to the States generally, and provided the method of selecting indemnity therefor. As thus amended these sections clearly provide that if, prior to survey, settlement is made under the preemption or homestead laws, upon land afterwards found to fall within section 16 or 36, such settlement shall be protected and the State is relegated to taking indemnity therefor. In construing the act making the grant to the State and the act of 1891 amending sections 2275 and 2276, this Department has repeatedly and uniformly held that a State admitted into the Union under the said act of 1889 acquires no rights to lands in sections 16 and 36 prior to the survey, and that the provisions of the act of 1889 where they conflict with sections 2275 and 2276, Revised Statutes, as amended, are superseded by the provisions of the amended sections and that the grant of school lands

provided for in the act of 1889 must be administered and adjusted in accordance with the later legislation. See *State of Washington v. Kuhn* (24 L. D., 12); *Todd v. State of Washington* (24 L. D., 106); *South Dakota v. Riley* (34 L. D., 657); *South Dakota v. Thomas* (35 L. D., 171).

It will be observed that the cases cited involve conflicts between settlers prior to survey and the claim of the State under the school grant, and the Department held that in view of the plain language of the amendatory act of 1891 the claims of the States must yield to those of the settlers.

The State maintains that Congress had no authority to thus modify the granting act of 1889 without first procuring the State's consent, and while that argument, whatever be its force, might have been properly presented in the cases cited it has little or no bearing upon the question now under consideration, because it will be observed that the inhibition contained in section eleven of the granting act was specifically against the making of any settlement upon or entry of the lands embraced in sections 16 and 36, "whether surveyed or unsurveyed," under the preemption, homestead, or other land laws of the United States. Congress did not declare that by making the grant to the State the power of the United States to make any other disposition was thereby lost; on the contrary, that such was not the intent of Congress is manifested from the fact that in the granting act special provision was made whereby the State might be indemnified in the event the lands found to fall within the limits of the school sections granted should be embraced in "Indian, military, or other reservations of any character."

This Department and the courts also have uniformly held that the grant of sections 16 and 36 to the State does not vest until the lands are identified by survey, and the date of the survey is not fixed by the time the work is done in the field but by the approval of the township plat by the proper authority. (5 L. D., 415; 24 L. D., 54.)

In the case of *Cooper v. Roberts* (18 How., 173), the Supreme Court said:

We agree, that until the survey of the township and the designation of the specific section, the right of the State rests in compact—binding, it is true, the public faith, and depending for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object, upon which it can attach, and if there is no legal impediment the title of the State becomes a legal title.

The same court in the comparatively recent case of *Minnesota v. Hitchcock* (185 U. S., 393), after quoting from the decision in the case of *Cooper v. Roberts*, *supra*, used the following language:

But while this is true, it is also true that Congress does not, by the section making the school land grant, either in letter or spirit, bind itself to remove all

burdens which may rest upon lands belonging to the government within the state, or to transform all from their existing status to that of public lands, strictly so-called, in order that the school grant may operate upon the sections named. It is, of course, to be presumed that Congress will act in good faith; that it will not attempt to impair the scope of the school grant; that it intends that the State shall receive the particular sections or their equivalent in aid of its public school system. But considerations may arise which will justify an appropriation of a body of lands within the State to other purposes, and if those lands have never become public lands the power of Congress to deal with them is not restricted by the school grant, and the State must seek relief in the clause which gives it equivalent sections. If, for instance, Congress in its judgment believes that within the limits of an Indian reservation or unceded Indian country—that is, within a tract which is not strictly public lands—certain lands should be set apart for a public park, or as a reservation for military purposes, or for any other public uses, it has the power notwithstanding the provisions of the school grant section.

So, in construing the grant of school lands made to the State of Nevada by the act approved March 21, 1864 (13 Stat., 30), the Supreme Court, after stating that the grant was a grant *in presenti*, held that—

until the status of the lands was fixed by a survey and they were capable of identification, Congress reserved absolute power over them; and if in exercising it the whole or any part of a sixteenth or thirty-sixth section had been disposed of the State was to be compensated by other lands equal in quantity. [Heydenfeldt v. Daney Gold and Silver Mining Company, 93 U. S., 634, 640.]

It will thus be seen that the grant to the State of Montana, like school grants made to other States, while a grant *in presenti* did not attach to any particular tract of land until it was surveyed; that if prior to such survey, that is, prior to the date when that survey is officially approved, Congress, or some officer of the government acting under the authority of Congress, should make other disposition of the land, the right of the State to that particular section is thereby defeated; otherwise it would have been useless for Congress to make any provision whatever for the taking of indemnity.

This Department has recently had occasion to consider similar questions in connection with a case arising in South Dakota, and you are respectfully referred to the decision rendered in that case which is published in the thirty-seventh volume of Land Decisions, at page 469, *et seq.*

In view of these considerations this Department is of the opinion that the land involved herein was legally included in the forest reserve prior to its survey, and that the State's title does not attach until the reservation is extinguished and the land restored to the public domain. However, under the terms of the act of February 28, 1891, *supra*, the State, without awaiting the extinguishment of the reservation, may immediately avail itself of the privilege of taking indemnity for the lands so reserved.

Upon careful consideration it is believed that you will perceive that the act of 1891 was manifestly passed in the interests of the States, and that notwithstanding the somewhat unusual language of the eleventh section of the act of 1889 the States admitted into the Union thereunder—Montana being one of them—have derived material benefits from the act of 1891. By the granting act lands in Indian, military, or other reservations of any kind are declared to be not subject to the grants or to the indemnity provisions of the act until the reservation shall have been extinguished; the States are confined in taking indemnity to tracts contiguous to those in lieu of which the indemnity is taken; and there is no provision for the taking of indemnity in lieu of unsurveyed lands in any reservation; while by the act of 1891 the indemnity may be taken anywhere in the State; the States need not await the extinguishment of the reservation before taking indemnity for the school sections situated therein; and the quantity of indemnity to which the States may be entitled may be ascertained without awaiting the extension of the public surveys over the reservations involved.

Moreover, by modifying the terms of section eleven of the granting act, Congress, by the act of 1891, evidently had the welfare of the States in view, because, if no protection had been afforded settlers who prior to survey might locate upon lands afterwards found to be within the sixteenth or thirty-sixth section, it is absolutely certain that the development of the States would have been so retarded as to result in incalculable damage. Under the law as it now stands, however, settlers who located prior to survey are protected, and it is believed that it will not be seriously questioned that this fact alone has largely contributed to the rapid development of the States admitted under the act of 1889.

In this connection it is believed that an opinion recently rendered by the Attorney-General on a question somewhat similar may have some bearing upon this case. The question involved in that case was the construction of the act of August 18, 1894 (28 Stat., 394), granting the preference right of selection to certain States and Territories, and the Attorney-General, to whom the matter was referred for an opinion, held September 15, 1907, that notwithstanding the lands might have been withdrawn for the State upon its application for a survey, until the State's right was actually fixed to some specific tract by proper selection, the government had authority to make other disposition of the land and thus defeat entirely the State's right to make the selection. [See 38 L. D., 224.]

DESERT LAND ENTRY — EFFECT OF ASSIGNMENT — QUALIFICATION OF ASSIGNEE.

BONE *v.* ROCKWOOD.

Where assignment is made of a desert land entry and the assignee recognized by the General Land Office, the entryman or person making the assignment thereby parts with his title to the land, even though it be subsequently shown upon contest or investigation that the assignee is not qualified to hold by assignment.

The charge that the assignee of a desert land entry is disqualified to take by assignment is sufficient basis for a contest.

Owens *et al. v.* State of California, 22 L. D., 369, Vradenburg's Heirs *et al. v.* Orr *et al.*, 25 L. D., 323, and Heinzman *et al. v.* Letroadee's Heirs *et al.*, 28 L. D., 497, overruled.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, October 2, 1909.* (J. H. T.)

An appeal has been filed by Samuel C. Bone from your decision of November 2, 1908, dismissing his contest against Edmund H. Rockwood, assignee of James L. Thompson, involving desert land entry for the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 11, T. 16 S., R. 14 E., Los Angeles, California.

April 27, 1904, James L. Thompson made desert land entry for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, and N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 11, T. 16 S., R. 14 E., which he assigned to William F. Thompson January 30, 1907. Subsequently the said William F. Thompson relinquished the entry as to the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, leaving intact the entry as to the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$.

October 17, 1907, the entry was assigned to Edmund H. Rockwood. Rockwood has applied for an extension of time in which to submit final proof, which application appears to be still pending unacted upon by your office.

It further appears that by your letter "G", January 16, 1908, the assignment to Rockwood was held for rejection, for the reason that it appeared in his affidavit accompanying the assignment that he also held under assignment the SE. $\frac{1}{4}$, Sec. 3, T. 17 S., R. 13 E., from Catherine V. Rockwood. It was stated in your said letter that to recognize Rockwood as assignee would be in effect to permit him to make two desert land entries, and thus permit him to do indirectly what the law would not permit him to do directly. It appears, however, that the said proceeding against the assignment was afterwards abandoned, as by your telegram of February 8, 1908, to the local officers, it was directed that action on all desert land entries, held for cancellation because entrymen or other assignees have previously taken other assignments under the desert land law, be suspended for the reason that the question was at that time being considered by the

Department. In the new regulations under the desert land laws, dated November 30, 1908 (37 L. D., 312), it was provided:

The desert land right is exhausted either by making an entry or by taking one by assignment. However, under the practice recognized by the General Land Office where assignments were taken of more than one entry or where a person made an entry and also took one or more entries by assignment, the aggregated area of the land embraced in all such entries not exceeding 320 acres, such assignments and entries will not be disturbed.

Under said regulations, therefore, it would appear that the assignment to Rockwood would not be open to the objection made in your letter of January 16, 1908, and if no other objection appeared, the assignment would not be disturbed.

However, on January 22, 1908, Samuel C. Bone filed contest affidavit against said entry, alleging:

That he is well acquainted with the tract of land embraced in the desert land entry of James L. Thompson, No. 2651, made April 27, 1904, for the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 11, T. 16 S., R. 14 E., S. B. M., and assigned to Edmund H. Rockwood on October 17, 1907, and knows the present condition of the same; also that said Edmund H. Rockwood made desert land entry No. 1737 on January 15, 1902, for N. $\frac{1}{4}$, Sec. 9, T. 13 S., R. 14 E., S. B. M., containing 320 acres and had therefore exhausted his right of entry to public lands; that therefore said Rockwood's ownership of said desert land entry, No. 2651, is illegal.

In your said decision of November 2, 1908, rejecting the application to contest, you relied upon the decision in the case of *Heinzman et al. v. Letroadec's Heirs et al.* (28 L. D., 497), wherein it was held, syllabus:

An assignment of a desert land entry to one disqualified to acquire title under the desert land law does not render the entry fraudulent, but leaves the right thereto still in the entryman.

You then stated that should the charges be proven, the entry would not be canceled according to the decision cited.

The Department is of the opinion that the decision above recited and others below designated are not sound and should be overruled. When William F. Thompson assigned to Rockwood he parted with his claim to the land and was divested of all right therein by the said assignment. So far as the rights of Thompson are concerned, the assignment had the same effect as a relinquishment. Had he relinquished the entire entry, and the land had been thereafter entered by another person who was afterwards found to be disqualified to acquire title, it certainly would not be held that the original entry should be reinstated upon cancellation of the subsequent entry. It must be held, therefore, in cases where an attempted assignment is made and the assignee recognized by the General Land Office, that the entryman, or person making the assignment, has parted with his title to the land, even though it be subsequently shown upon contest

or investigation that the assignee is not qualified to hold by assignment. *Love v. Flahive* (205 U. S., 195). Any other rule would permit unlawful assignments to be made without any penalty by way of forfeiture in case of detection.

Accordingly the decisions in the cases of *Owens et al. v. State of California* (22 L. D., 369), *Vradenburg's Heirs et al. v. Orr et al.* (25 L. D., 323), *Heinzman et al. v. Letroadec's Heirs et al.* (28 L. D., 497), in so far as they conflict with the above views, are hereby overruled, and these and any other decisions not in harmony herewith will no longer be followed.

According to the views above expressed, the contest should be allowed to proceed and it is so directed. Your decision is reversed.

ISOLATED TRACTS—CITIZENSHIP—AMENDING CIRCULAR OF DECEMBER
27, 1907.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 2, 1909.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: Paragraphs 2 and 10 of the circular of December 27, 1907 (36 L. D., 216), are hereby amended to read as follows:

2. Applicants must show by their affidavits, corroborated by at least two witnesses, that the land contains no salines, coal, or other minerals; the amount, kind, and value of timber or stone thereon, if any; whether the land is occupied, and if so the nature of the occupancy; for what purpose the land is chiefly valuable; why it is desired that same be sold; that applicant desires to purchase the land for his own individual use and actual occupation and not for speculative purposes; that he has not heretofore purchased, under section 2455, Revised Statutes, or the amendments thereto, isolated tracts, the area of which, when added to the area now applied for, will exceed approximately 160 acres, and that he is a citizen of the United States, or has declared his intention to become such. If applicant has heretofore purchased lands under the provisions of the acts relating to isolated tracts, same must be described in the application by subdivision, section, township, and range.

10. At the time and place fixed for sale the register or receiver will read the notice of sale, offer each body of land included in the notice separately, and allow all qualified persons present an opportunity to bid. After all bids have been offered the local officers will declare the sale closed and announce the name of the highest bidder, who will be declared the purchaser and who must immediately deposit the amount bid by him, and, if the highest bidder or bidders be other than the applicant for offering, an amount sufficient to cover the cost of publication of notice, with the receiver, and within ten days thereafter furnish evidence of citizenship, or of declaration of intention to become a citizen, nonmineral and nonsaline affidavit, Form 4-062, or nonsaline affidavit,

Form 4-062a, as the case may require. Upon receipt of the proof, and payment having been made for the lands, the local officers will issue the proper final papers. They will also, in the event of the sale of the lands to other than the applicant for the offering (the latter being a bidder for the lands), refund to applicant the amount originally deposited by him to cover the cost of publication of notice. Should different tracts included in one notice be sold to several bidders other than the applicant, the cost of publication must be apportioned among them and collected for return to the applicant, as above indicated. If the applicant is the successful bidder for one or more of the tracts offered, the remaining tracts being disposed of to other bidders, the proportionate cost of publication only shall be collected from the successful bidders other than the applicant, for refund to the latter.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

FRANK PIERCE,
Acting Secretary.

ISOLATED TRACTS—KINKAID ACTS—CITIZENSHIP—AMENDING CIRCULAR OF OCTOBER 28, 1908.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 2, 1909.

REGISTERS AND RECEIVERS,

United States Land Offices.

SIRS: Paragraphs 17 and 25 of the circular of October 28, 1908 (37 L. D., 225), are hereby amended to read as follows:

17. Applicants must show by their affidavits, corroborated by at least two witnesses, that the land contains no salines, coal, or other minerals; the amount, kind, and value of timber or stone thereon, if any; whether the land is occupied, and if so the nature of the occupancy; for what purpose the land is chiefly valuable; why it is desired that same be sold; that applicant desires to purchase the land for his own individual use and actual occupation and not for speculative purposes; that he has not heretofore purchased, under section 2455, Revised Statutes, or the amendments thereto, isolated tracts, the area of which when added to the area now applied for, will exceed approximately 480 acres, *and that he is a citizen of the United States, or has declared his intention to become such.* If applicant has heretofore purchased lands under the provisions of the acts relating to isolated tracts, same must be described in the application by subdivision, section, township, and range.

25. At the time and place fixed for sale the register or receiver will read the notice of sale, offer each body of land included in the notice separately, and allow all qualified persons present an opportunity to bid. After all bids have been offered the local officers will declare the sale closed and announce the name of the highest bidder, who will be declared the purchaser and who

must immediately deposit the amount bid by him, and, if the highest bidder or bidders be other than the applicant for offering, an amount sufficient to cover the cost of publication of notice, with the receiver, and within ten days thereafter furnish evidence of citizenship, *or of declaration of intention to become a citizen*, nonmineral and nonsaline affidavit, Form 4-062, and purchaser's affidavit, Form 4-093. Upon receipt of the proof, and payment having been made for the lands, the local officers will issue the proper final papers. They will also, in the event of the sale of the lands to other than the applicant for the offering (the latter being a bidder for the lands), refund to applicant the amount originally deposited by him to cover the cost of publication of notice. Should different tracts included in one notice be sold to several bidders other than the applicant, the cost of publication must be apportioned among them and collected for return to the applicant, as above indicated. If the applicant is the successful bidder for one or more of the tracts offered, the remaining tracts being disposed of to other bidders, the proportionate cost of publication only shall be collected from the successful bidders other than the applicant, for refund to the latter.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

FRANK PIERCE,
Acting Secretary.

CITIZENSHIP—MINOR CHILD—SECTION 2172, REVISED STATUTES.

THOMAS v. HOLLEY.

One who at the date of the admission of South Dakota into the Union was an inhabitant and recognized as a member of that political community became by such admission a citizen of the United States; and his minor children at that time residing in the United States thereby, by virtue of the provisions of section 2172 of the Revised Statutes, also became citizens.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, October 5, 1909.* (C. J. G.)

An appeal has been filed by plaintiff in the case of Susan M. Thomas v. Siver Holley from the decision of your office of May 1, 1909, sustaining the action of the local officers in denying her application to make homestead entry for the SW. $\frac{1}{4}$ of Sec. 32, T. 9 N., R. 29 E., Pierre, South Dakota.

This land is located in the former Fort Bennett military reservation. The plat of survey of said land was filed in the local office May 12, 1908, survey in the field having been made in May, 1905. Siver Holley made homestead entry for the land May 13, 1908, alleging that he settled thereon more than two years prior to his entry, at which time he commenced his improvements, consisting of a house, shed, and fences, said improvements being worth \$450, and that he

had maintained continuous residence. His papers were accompanied by a copy of a declaration of intention to become a citizen of the United States. The original declaration, however, was later returned to the court.

May 27, 1908, Susan M. Thomas applied to enter the same land, alleging that she settled thereon May 20, 1907, built a house, and continued to reside there ever since, with the intention of making homestead entry as soon as the land should become subject to entry.

A hearing was had for the purpose of determining priority of right to the land, and upon the testimony submitted the local officers rendered decision recommending that the application of Thomas be rejected and that Holley's homestead entry remain intact. Your office affirmed said decision.

The testimony is found to fully sustain the conclusion that Holley was the prior settler and that Susan M. Thomas knew of such settlement at the time she erected her house and established residence. The facts as to this point are sufficiently set forth in the decision of your office.

The only other question to be determined is as to the qualification of Holley, in respect to his citizenship, to make entry. He was born in Norway in 1877 and came to the United States with his parents in 1878 or 1879, and to what is now South Dakota in 1884, where the father lived to the time of his death and where the son, the defendant, has lived ever since. The evidence shows that the father during his lifetime was a voter in Dakota Territory and the State of South Dakota and had taken out his first naturalization papers. It is provided in section 2172 of the Revised Statutes:

The children of persons who have been duly naturalized under any law of the United States . . . being under the age of twenty-one years at the time of naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof.

An alien may become naturalized under the organic and enabling acts and the act admitting a State into the Union. *Boyd v. Thayer* (143 U. S., 135). At the date of the admission of South Dakota, the father of Siver Holley was an inhabitant thereof and was recognized as a member of that political community. Based upon the case of *Boyd v. Thayer*, it was held in the case of *William J. Parker* (36 L. D., 352):

One who at the date of the admission of North Dakota into the Union was an inhabitant and recognized as a member of that political community became by such admission a citizen of the United States.

Children born abroad of aliens who subsequently emigrated to this country with their families, and were naturalized during the minority of their children, are citizens of the United States. (10 Ops. Atty.

Gen., 329; and *Campbell v. Gordon*, 6 Cranch, 176.) It is immaterial in what lawful mode the naturalization of the parents is effected, the language of the statute being "the children of persons who have been duly naturalized under any law of the United States," etc. In the case of *Crane v. Reeder* (25 Mich., 303) it was held that a treaty is just as much a "law of the United States," within the meaning of section 2172 of the Revised Statutes, as an act of Congress, and, hence, that a minor child of one who became a citizen under Article 2 of Jay's Treaty (8 Stat., 116), if residing in the United States at the time, thereby became a citizen. His father having been naturalized by the act of Congress admitting South Dakota into the Union, Siver Holley thereby became a citizen of the United States, he being a minor at the time of such naturalization.

The judgment of your office, for the reasons stated herein, is affirmed.

RAILROAD GRANT—DONATION CLAIM—SECTION 5, ACT OF MARCH 3, 1887.

ADA A. STANG.

An abandoned donation claim, though uncanceled of record at the date of the definite location of a railroad grant, does not except the land covered thereby from the operation of the grant; and until it is determined by the land department that the land is excepted from the grant, a purchaser thereof from the company is not entitled to the right of purchase accorded by section 5 of the act of March 3, 1887.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, October 7, 1909.* (S. W. W.)

This is the appeal of Ada A. Stang from your office decision of September 29, 1908, affirming the action of the local office rejecting her application to purchase, under the provisions of the fifth section of the act of March 3, 1887 (24 Stat., 556), lots 4, 5, and 6, Sec. 21, T. 26 S., R. 6 W., Roseburg, Oregon, land district.

It appears that the land involved is within the primary limits of the grant made to the Oregon and California Railroad Company by the act of July 25, 1866 (14 Stat., 239), opposite that portion of the road definitely located March 26, 1870; that said land was listed by the company September 21, 1871, per list No. 1, but was not patented, presumably on account of conflict with the donation notification, No. 371, filed November 24, 1855, by George Evans, which said donation claim was canceled by your office April 4, 1896.

The local office rejected the application because it had not been determined by the Department that the land was excepted from the company's grant, and an appeal was taken to your office, in which it was alleged that the applicant was a purchaser by mesne conveyance

from the railroad company and that the land was excepted from the operation of the company's grant by reason of the donation claim of Evans. It was further stated by the applicant that she had no contest with the railroad company regarding the matter and that it would be as satisfactory to her for the government to issue a patent to the company, which would protect her title.

It is stated in your office decision under consideration that under the previous rulings of the Department the existence of an uncanceled donation notification at the date of the definite location of the road, excepted the land covered thereby from the operation of the grant, but in view of the decision of the Supreme Court in the case of the Oregon and California Railroad Company *v.* United States (190 U. S., 186), and in further view of a decision of the Circuit Court for the District of Oregon, wherein it was held that the existence of a donation notification of record did not prevent the operation of the grant to the company, your said decision held that the land in question was not excepted from the operation of the company's grant, and that therefore no right of purchase has accrued to the applicant under the act of March 3, 1887, *supra*.

In appealing to the Department the applicant contends that the existence of the donation claim on the records in the surveyor-general's office operated to except the land covered thereby from the grant to the company, and maintains that the burden is on the railroad company to prove that the donation claim had been abandoned. Appellant insists that she is entitled to protection by reason of her purchase from the railroad company, and that if the Department should conclude that she is not entitled to purchase because the land was not excepted from the grant to the company, in that event a patent should issue to the railroad company.

In the case of Oregon and California Railroad Company *v.* United States, *supra*, the court said:

Even admitting that the donation notification was on file in the office of the surveyor-general, there was no proof required by section seven of the act to be filed within twelve months from the time of settlement, that the settlement and cultivation required by the act had been commenced; nor after the expiration of four years from such settlement was there any proof of continual residence or cultivation, required by the same section. The record which informed the company that the land had been settled by a donee also apprised it that the provision of the statute had not been complied with. We think that, considering the fact that fourteen years had elapsed since the original settlement, the railroad company would be authorized to infer that the donee had abandoned the land, as in fact appears to have been the case. Under the facts of this case we think the lands were not reserved within the meaning of the granting act.

It is true, as stated in your office decision under consideration, the land involved in that case was within the indemnity limits of the

grant, and what was said by the court there is not necessarily applicable to a case involving a tract of land within the primary limits of the grant. However, it further appears from your office decision, that a case involving land within the primary limits of the road was tried by the Circuit Court of the District of Oregon, being No. 2260, in which the United States attempted to recover the value of certain land patented to the company, and the court dismissed the bill upon the authority of the Supreme Court in the case above cited. Moreover, it appears that the Acting Attorney-General, under date of March 3, 1905, concluded that the case seemed to be governed by the decision of the Supreme Court cited and advised the United States attorney that an appeal should not be taken.

In view of the foregoing it must be held that the donation claim of George Evans, though uncanceled of record at the time of the definite location of the grant to the company, did not except the land covered thereby from the grant because the subsequent proceedings had in the land department, which resulted in the cancellation of the donation claim, justifies the assumption that the said claim had been entirely abandoned at the date of the location of the road.

It follows that your office decision must be affirmed, but the applicant should be informed that her rights are fully protected by the existence of the company's selection, and that in the event the company's selection should be canceled for any other reason, she will be afforded another opportunity of purchasing the land under the act of 1887. Of course, if the land should be patented to the company she will be fully protected by her purchase therefrom.

STATE OF LOUISIANA.

Departmental decisions of June 6, 1904, 33 L. D., 13, and March 20, 1907, not reported, holding that swamp and overflowed lands within the Fort Sabine military reservation did not pass to the State under its swamp land grant, reconsidered October 7, 1909, on petition for exercise of the supervisory power of the Secretary, in the light of the decision of the Supreme Court of November 9, 1908, 211 U. S., 70, and adhered to.

SANTA FE PACIFIC RY. CO. *v.* NORTHERN PACIFIC RY. CO.

Motion for review of departmental decision of April 26, 1909, 37 L. D., 593, denied by First Assistant Secretary Pierce October 11, 1909.

REPAYMENT—RAILROAD SELECTION LISTS—FEES OF LOCAL OFFICERS.

UNION PACIFIC RY. CO. ET AL.

In adjudicating an application for repayment of fees paid in connection with railroad selection lists, based upon the elimination of tracts therefrom by cancellation, the list should be taken as the unit and the matter adjusted under the rules in force at the time the selection was made; and in making the adjustment the land department may take into consideration all the lists filed by the company, and is not confined to the lists upon which the application for repayment is based.

The register and receiver are each entitled under the provisions of the act of July 1, 1864, to a fee of \$1.00 for each final location of 160 acres made by a railroad company.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, October 12, 1909.* (S. W. W.)

This is an appeal filed on behalf of the Union Pacific Railway Company and the Union Pacific Land Company from the action of your office denying the application filed on behalf of said companies for the repayment of certain fees paid to various local land offices in connection with selection lists embracing tracts of land which have been eliminated from such lists by cancelation. It seems that the original application for repayment was denied by your office August 25, 1908, and thereafter certain communications were addressed to your office raising questions relative to the rule of adjustment employed, all of which were decided adversely to the applicants' contention, and an appeal has been taken to the Department for the purpose of establishing the proper rule of adjustment.

The amount originally claimed by the applicants was \$691.08, and in denying the application your office held that this amount was more than offset by short payments of office fees upon the lists involved, as indicated by tables and schedules which accompanied your decision, and, as a matter of fact, there was an excess due the United States in the sum of \$193.70. In ascertaining the amount of fees due the government in excess of those demanded in repayment, it appears that your office examined all of the lists of selections which had been filed by the railroad company, and did not confine the examination to those lists affected by the application for repayment, and it also appears that while three different rules providing for the payment of fees have obtained at various times in your office, the rule now in force, and which is more favorable to the government than either of the two rules previously obtaining, was applied.

It is contended on behalf of the company (1) that the act of July 1, 1864 (13 Stat., 335), contemplated and required the payment of only \$1.00 for each final location of 160 acres by a railroad corpora-

tion; that this sum was contemplated as the joint compensation of the register and receiver and was not intended to give each officer a fee of \$1.00; that the act of 1874, by which the general laws were revised, raised this amount from \$1.00 to \$2.00, but neither act required payment where the selection was less than 160 acres; (2) that where railroad selection lists have been adjudicated and settled they can not afterwards be reopened and another measure of payment applied thereto in accordance with a different rule adopted years thereafter; (3) that the only way in which the account may be properly stated is to ascertain the exact amount of local office fees paid by the company upon the lists involved in the application for repayment, and that from that amount there should be subtracted the fees properly due and payable upon the area in such list measured by the requirement in force at the time of the transaction involved in the particular list, and that the remainder will be the amount of unearned local office fees which should be refunded.

Respecting appellant's first contention that the act of July 1, 1864, required a railroad corporation to pay a fee of \$1.00 for each 160 acres of land located, it may be said that the act does not provide that the company should pay a fee of \$1.00, but that the registers and receivers of the land offices of the several states and territories should be entitled to receive a fee of \$1.00 for their services for each final location of 160 acres. It will be observed, as stated in the appeal, that the act does not specifically provide that the register and receiver shall each receive \$1.00; neither does it provide, however, that the registers and receivers of each land office shall receive a dollar, but the plain meaning of the act is that each officer in each of the land offices involved should be entitled to receive a dollar for his services.

Such has been the interpretation of this statute by the land department since soon after its enactment, and the rule is well settled by the courts that contemporaneous construction of a statute by the officers charged with the administration thereof is entitled to great consideration, and that where the rulings have been uniform and have obtained for years, they are practically controlling.

Respecting the different rules which have obtained in your office relative to the payment of fees where a selection involved a fraction and not the full quantity of 160 acres, it seems that the first rule was contained in the circular (No. 15) of January 24, 1867, approved January 29, of that year (2 Lester, 162), which provides for a fee of \$1.00 each to the registers and receivers upon each final location of 160 acres, or any quantity approximate thereto when the deficit was less than 40 acres, and that no payment was required when the deficit was in excess of 40 acres. It is claimed by counsel that this rule

obtained until the circular of July 12, 1883 (2 L. D., 662), was issued, which provided that:

In computing the amount of fees on a list of railroad selections, you will divide the total acreage by 160; the quotient will be the number of 160-acre selections, which multiplied by \$2.00 will give the amount of fees. Should the quotient consist of a whole number and a fraction you will for the latter collect \$1.00, if the fraction is 80 acres or more, and nothing if less than 80 acres.

Counsel for the appellants claims that all of the selections involved were made at times when the rules above cited were in force, and that none were made under the circular of May 20, 1905 (33 L. D., 627, 631), which provides for the payment of a fee of \$2.00 for each final location of 160 acres or any fraction thereof; and it is earnestly submitted that your office, in applying the rule now obtaining to selections which were made years ago when entirely different rulings obtained, is clearly and manifestly unjust.

A serious question is presented by this feature of the case. The statute is plain in requiring and in fixing the fee for each location of 160 acres, and if the statute were equally plain in fixing the fee for the selection of fractions of less than 160 acres it would be the duty of the Department to require the adjustment of the matter in accordance with the provisions of the law whether a different rule had obtained at various times or not, but the statute is not plain as to the fees required in case of locations of fractional parts of 160 acres, and rules were promulgated by the Department providing for such contingencies. It is true the former rules were more liberal to the railroad companies than the rule now obtaining, and the first rule was more liberal than the one which succeeded it. It will be observed, however, that these rules were issued by the land department and were acceded to by the companies. They constituted the interpretation of the statute by the officers of the Department in control of the matter at that time, and under the circumstances it is not believed that in adjusting an application for repayment of fees paid under former rulings resort should be had to a later and different rule to ascertain the fees which should have been paid.

In regard to appellant's contention, however, that when application for repayment is made because of the cancellation of certain tracts from a list, the amount of fees which should have been paid for lands which have been patented and embraced in the same list should not be taken into consideration in ascertaining the amount of fees to be refunded, it may be said that it is not believed that the question of repayment could be properly determined in any other way than by examining all of the selections embraced in the list. Moreover, it is believed that if a railway company elects to apply for repayment in connection with various lists of selections made years ago, it is entirely competent and proper for the land department, in

considering whether or not the repayment is due, to examine not only the lists involved in the application for repayment but any other lists filed by the company, and where through mistake or otherwise insufficient payment was made on account of any of the lists, demand therefor should be made upon the company; and after ascertaining the amount, if any, due under the application for repayment, in stating the account thereof to the Treasury Department report should be made of indebtedness due to under-payments on other lists, to the end that proper offset be made as against the amount found due under the application for repayment.

In view of these considerations the following rule is established for the guidance of your office in such matters: The list of selections should be made the unit and the amount of fees required should be determined by the rule in force at the time the selections were made. For every 160 acres of lands patented there must be the sum of \$2.00 paid to compensate the register and receiver. By this means the entire amount of fees due on a given list can be ascertained, and if more than such amount were paid the difference between the amount paid and the amount due will be the amount to be refunded. As above indicated, payment for fractions should be determined by the rule in force at the time the selection was presented, and in considering an application for repayment your office need not confine its examination to the lists involved but may consider all of the lists filed by the same company, for the purpose of correcting errors found therein.

The action of your office is modified accordingly and the case remanded for adjudication in accordance with the rule laid down herein.

HOMESTEAD CONTEST—CHARGE OF INADAPTABILITY OF LAND FOR AGRICULTURAL USE.

DAVIS v. GIBSON.

Land unadapted to any agricultural use is not subject to entry under the homestead law; and an affidavit of contest in effect charging such inadaptability is sufficient basis for a hearing.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, October 14, 1909.* (E. F. B.)

With your letter of September 23, 1909, you transmit the appeal of William D. Davis from the decision of your office of May 13, 1909, dismissing his contest against the homestead entry of Robert E. Gibson for lot 3, Sec. 27, and lot 2, Sec. 34, T. 30 S., R. 19 E., Gainesville, Florida.

The land in question is an island in Hillsborough Bay, known as "Bull Frog Mound," and was surveyed pursuant to the decision of the Department of October 27, 1906, in which you were directed to dispose of said land as an isolated tract.

On August 8, 1907, Gibson was allowed to make homestead entry of said island, which was submitted to the Department by your letter of January 11, 1908, with the recommendation that said entry be allowed.

The Department by letter of January 21, 1908, approved your recommendation upon the affidavit of Gibson that he had bought the improvements of a prior settler, was living on the land and had cultivated some of it to vegetables.

The effect of the approval of your recommendation and the allowance of the homestead entry of Gibson was merely to vacate the order directing that it be sold at public outcry as an isolated tract so far as it affected the entry of Gibson. It was not intended to protect such entry from attack for failure to comply with the homestead law as to residence, improvement and cultivation, or from the charge that the law as to cultivation cannot be complied with, for the reason that there is no land within said entry susceptible of cultivation.

That is practically the charge laid in the contest of Davis. He alleges that Gibson did not in good faith make settlement and begin cultivation within six months from date of entry, and was absent from the land for more than a period of six months. While there is no specific charge that the entryman has failed to establish and maintain a residence upon the land, it is charged that said land consists of a deposit of shell on a sand bar which is covered by water at high tide, save the deposit of shell, and that there is no soil on said mound and it is not susceptible of cultivation, or of use as a place of residence. He alleges that said entry was not made honestly and in good faith for the purpose of actual settlement and cultivation.

If such charge can be sustained, it would result in the cancellation of the entry, for the reason that no entry can be made in good faith of land that is not susceptible of cultivation where the entryman must have had knowledge of such condition. The law requires that an entryman must not only reside upon and improve his claim but must cultivate it. "The purpose of the homestead law is to secure the establishment of actual agricultural homes upon the public lands. The improvement and cultivation of the land are necessary acts to that end." (George Hathaway, 38 L. D., 33, 34.)

If this land cannot be adapted to any agricultural use, there can be no valid entry of it under that law, and if such condition was known to exist by the entryman at the date of his entry it was not made in good faith and should be canceled.

The charge in the contest is sufficient to warrant a hearing for that purpose, and it should be ordered.

The contention of appellant that the land is not public land is without merit. That question was determined when the survey was ordered to be made, upon the showing that the island was in existence at the time of the township survey, and no objection was made by owners of the adjacent tracts, or the State authorities, upon whom the application for survey was served.

Your decision dismissing the contest is reversed.

If upon the hearing of said contest it should be found that the land cannot be utilized for any agricultural purpose, the entry will be canceled and the land will be sold as an isolated tract, as directed in the decision of the Department of January 21, 1908.

PRACTICE-REHEARING-NOTICE-RULE 19.

ERICKSON v. SMITH.

Rule 19 of Practice contemplates that orders for rehearing shall be served in the manner prescribed by Rule 9, which requires personal service.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, October 15, 1909.* (O. W. L.)

Cora B. Smith, formerly Cora B. Chapman, has filed a petition requesting rehearing in the matter of her homestead entry, No. 11,174, made June 27, 1902, at The Dalles, Oregon, for lot 3, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 4, and SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 5, T. 18 S., R. 11 E., W. M., which was held for cancellation by your office decision of November 18, 1908, affirmed by the Department on appeal May 10, 1909. Although styled a petition for rehearing, the action taken is in effect a motion for review.

The contest affidavit was filed October 12, 1906, and hearing thereon held in December, 1906. Upon this testimony the register and receiver decided in favor of the contestee, holding as follows:

From the testimony presented in this case it appears that the notice of contest was served upon the defendant upon the land in contest; that the defendant was residing upon said land at that time; that it does not appear that she established residence as result of knowledge of this contest; that the contestant has failed to submit sufficient evidence to sustain the allegations of contest; that contestee cured any laches she may have been guilty of prior to the initiation of this contest.

In the time limited for appeal from this decision the contestant, in place of an appeal, filed a motion for rehearing, the prayer of the petition reading as follows:

Wherefore, your petitioner moves for a rehearing of this contest on the ground of newly-discovered evidence and offers in support thereof the affidavits of

The register and receiver transmitted the entire record, together with this motion to your office and your office, September 23, 1907, remanded the case to them with the following instructions:

The record is herewith returned for appropriate action by you, and if a rehearing is allowed and testimony submitted you will consider the same with the testimony herewith returned and render a new decision, giving the defeated party the usual right of appeal.

Acting under these instructions, the register and receiver issued an order holding the motion for rehearing to be sufficient and directing further as follows:

Said parties are hereby notified to appear, respond and offer evidence touching the allegations in this case, before H. C. Ellis, a United States commissioner, at his office in Bend, Oregon, at ten o'clock A. M. on January 24, 1908; final hearing before this office at ten o'clock A. M. on January 31, 1908. At said hearing the contestant will be allowed to submit additional testimony in accordance with her application for rehearing, and the defendant will be allowed to submit testimony in rebuttal.

The register and receiver sent copies of this notice to all parties in interest by registered mail; the return shows that one counsel for the contestee received the notice December 13, 1907, the other, December 21, 1907; the contestee herself did not receive the notice until January 27, 1908, while the hearing was in progress. However, on January 13, 1908, she was personally served with a subpoena in behalf of the contestant to appear upon January 24, 1908. At the hearing she appeared by counsel but not in person, due to the fact of severe illness. Her counsel immediately moved that the rehearing be dismissed because personal service was not had, as directed by Rule 19 of the Rules of Practice. The officer taking the testimony had no power to pass upon this motion and the counsel for contestee introduced evidence in her behalf with the distinct statement that it was made without prejudice to his motion to dismiss.

The contestee submitted commutation proof August 14, 1909, in which she alleges continuous residence since November 19, 1906, and states that she has a house, barn, root cellar, 35 acres fenced and about four and one half acres in cultivation, the total value of her improvements being about \$600.

Upon the rehearing the local officers denied the motion to dismiss for the reason that jurisdiction had been acquired by service of the original notice and the proceeding upon rehearing was interlocutory, and that the notice of same had been properly served by registered mail. Upon the rehearing they found that the contestee had been in default at the time of the initiation of the contest, and that her residence upon the land at the time of service of notice was induced by the knowledge of the pending contest.

Your office, upon appeal, held that the order for rehearing was interlocutory and that service of notice thereof by registered letter was proper. This was affirmed in the Department's decision in the following language:

In regard to the service of notice of rehearing by registered mail, instead of copy delivered to contestee personally, such contention is purely technical, as the contestee had full notice of rehearing with opportunity to make defense if she had chosen so to do. In fact such service is valid under Rule 17 of Practice.

Counsel for the petitioner now urges that the motion to dismiss should have been granted and a personal service under Rule 19 should have been had. Rule 19 prescribes that orders for rehearing must be brought to the notice of the parties in the same manner as in case of original proceedings. This rule therefore excepts orders for rehearing from the other classes of orders covered by Rule 17. Notice therefore should have been properly served under Rule 9, requiring personal service, and not under Rule 17. The case is not similar to that of *Piper v. The State of Wyoming* (15 L. D., 94), for the reason that in that case the register and receiver had not yet rendered a decision, the case simply being reopened for further testimony.

From the above it is apparent that it would undoubtedly have been the better practice to have served the notice of rehearing personally. However, should the present petition be granted it would merely result in the retaking of testimony already submitted, of the taking of which the contestee had full knowledge, and thereby inflicting useless expense upon both parties. The Department has power to suspend its rules of practice in order to facilitate and promote justice where the enforcement of the rule would embarrass and defeat a just decision. See *Caledonia Mining Company v. Rowen* (2 L. D., 714, 720).

It is also urged that the petition was not sufficient upon which to order a rehearing, and that the decision upon the merits is not warranted by the evidence. Both of these contentions are without foundation and the Department is convinced that, upon the merits, its prior decision is correct.

The petition for rehearing is therefore denied.

CLARKE I. WYMAN.

Motion for review of departmental decisions of May 12, 1909, and August 24, 1909, 38 L. D., 164, denied by First Assistant Secretary Pierce October 15, 1909.

**REPAYMENT OF FEES—SELECTION UNDER THE ACT OF JULY 1, 1898—
ACT OF MARCH 26, 1908.****NORTHERN PACIFIC RY. CO.**

The Northern Pacific Railway Company having voluntarily relinquished a selection under the act of July 1, 1898, after having paid the required fees, and subsequently embraced the same tracts in other lists under that act and again paid fees thereon, is entitled under the act of March 26, 1908, to repayment of the fees paid upon the first selection.

*First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) Land Office, October 16, 1909. (S. W. W.)*

This is the appeal of the Northern Pacific Railway Company from your office decision of June 11, 1909, denying its application for repayment of fees paid on Dickinson, North Dakota, selection list No. 109, and La Grande selection lists Nos. 61 and 62, under the act of July 1, 1898 (30 Stat., 597, 620):

It appears that after these selections were filed it was ascertained by the company that there was not sufficient time within which notice of the selection might be posted and published, as required by the circular of February 21, 1908 (36 L. D., 278), and that the lists were relinquished and the same lands again selected under the same act in other lists, payment of the fees required by the law and regulations having been made in both cases.

Your office decision denying the application held that these selections were not in conflict when made and that they were not therefore erroneously allowed; that for that reason the act of June 16, 1880 (21 Stat., 287), does not apply to the case; and that no fees are repayable under the act of March 26, 1908 (35 Stat., 48).

The law and regulations in force at the time these selections were made provided that a fee of two dollars should be paid by the railway company for final location of every 160 acres of land or fraction thereof. Inasmuch as it appears that twice that amount has been paid upon the final location of these lands it would seem that the double payment of fees constitutes an excess payment within the contemplation of the act of March 26, 1908, *supra*, which provides—

That in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives.

It follows that the action of your office must be reversed, and the application will be submitted for allowance.

SELECTION LISTS BY STATES, RAILROAD COMPANIES, ETC.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., October 16, 1909.

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: In connection with submission of indemnity school selection lists and other selections by States, railroads, or individuals within areas withdrawn for coal classification, or classified as coal lands but which have been reported by special agents of your office, after examination, as non-coal in character, it is suggested that in order that the Department may have all available information upon the subject and that the disposition of the lands be safeguarded, such selections when ready for transmission to the Department be first submitted by you to the Director of the Geological Survey for report from him as to whether any objection to the approval of the selections, on the ground of the character of the lands, is shown by the records of his Bureau.

Very respectfully,

FRANK PIERCE,
Acting Secretary.

HOMESTEAD ENTRY ON RAILROAD LANDS—CREDIT FOR RESIDENCE
AND IMPROVEMENTS—ACT OF APRIL 19, 1904, AND SEC. 6. ACT OF
MAY 29, 1908.

PETER JUSKI.

By making an entry for less than 160 acres and receiving credit thereon, under the act of April 19, 1904, for residence and improvements upon a prior entry which failed by reason of the decision of the Supreme Court in the case of *Wisconsin Central R. R. Co. v. Forsythe* holding the land to have passed to the railroad company under its grant, the entryman exhausted his right under that act, and is not entitled, in connection with an additional entry, to any further credit, under section 6 of the act of May 29, 1908, on account of such residence and improvements.

*First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) Land Office, October 25, 1909. (S. W. W.)*

This is the appeal of Peter Juski from your office decision of April 8, 1909, holding that in order to acquire title to the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 21, T. 32 N., R. 86 W., Douglas, Wyoming, land district, it will be necessary for him to comply with the requirements of the homestead law as to residence and cultivation.

It appears from the record that on January 2, 1892, Juski made homestead entry, No. 2752, at Ashland, Wisconsin, for the NW. $\frac{1}{4}$ of Sec. 7, T. 45 N., R. 4 W., which entry was allowed under the

order of the Department bearing date October 22, 1891. The title to this tract of land, with others, was thereafter the subject of a decision by the Supreme Court of the United States wherein it was held that the lands were not property of the United States, as held by the Department, but belonged to the railroad company (159 U. S., 46), and, in accordance with that decision, Juski's entry was canceled by your office March 24, 1896.

By an act passed April 19, 1904 (32 Stat., 184), Congress provided that all qualified homesteaders who had entered railroad lands under the departmental order of October 22, 1891, above mentioned, and were thereafter prevented from completing title to the land so settled upon and improved, by reason of the decision of the Supreme Court in the case of Wisconsin Central Railroad Co. v. Forsythe (159 U. S., 46), should be given credit, in making final proof upon homestead entries made for other lands, for the period of their *bona fide* residence upon and the amount of improvements made on the lands to which they were unable to complete title. It seems that Juski took advantage of the provisions of that act and on January 27, 1906, made homestead entry, No. 11896, at Marquette, Michigan, for the N. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 13, T. 44 N., R. 35 E., for which he received a patent in due time, and in acquiring title to this tract of land he was not required to reside upon or cultivate the same but was given credit for his residence and improvements upon the land in Wisconsin.

Having thus acquired title to only 120 acres under his entry made in Michigan, and having entered 160 acres of land in Wisconsin, Juski claims that he has not had the benefits of the homestead law and is therefore entitled to acquire title to 40 acres additional under the provisions of the act of May 29, 1908 (35 Stat., 465), section six of which provides:

That all qualified homesteaders who, under an order issued by the Land Department bearing date October twenty-second, eighteen hundred and ninety-one, and taking effect November second, eighteen hundred and ninety-one, made settlement upon and improved any portion of an odd-numbered section within the conflicting limits of the grants made in aid of the construction of the Chicago, Saint Paul, Minneapolis and Omaha Railway and the Wisconsin Central Railroad, and were thereafter prevented from completing title to the land so settled upon and improved by reason of the decision of the Supreme Court in the case of Wisconsin Central Railroad Company against Forsythe (One hundred and fifty-ninth United States, page forty-six), shall in making final proof upon homestead entries made for other lands, be given credit for the period of their *bona fide* residence upon and the amount of their improvements made on the lands for which they were unable to complete title. In the event that any entryman entitled to the benefits of this act, shall have died, the right to make such second entry shall inure to his surviving widow, and if there be no widow living then to his minor child or children, if any, in the manner hereinbefore provided: *Provided*, That no such person shall be

entitled to the benefits of this act who shall fail to make entry within two years after the passage of this act: *And provided further*, That this act shall not be considered as entitling any person to make another homestead entry who shall have received the benefits of the homestead law since being prevented, as aforesaid, from completing title to the lands as aforesaid settled upon and improved by him.

Not only has an elaborate brief been filed by counsel in support of the appeal but the case has been orally argued before the Department, and it is earnestly contended that your office erred in requiring that Juski shall reside upon and cultivate the land applied for herein before he will be allowed to acquire title under the homestead laws. Counsel for Juski refers to the procedure adopted by the Department under what he terms similar acts respecting the adjudication of conflicting claims of settlers and railroad companies, and maintains that the practice followed under those acts should be adopted here and that the action taken in cases arising under those acts is controlling of the disposition of this case.

The alleged similar acts cited by counsel are the acts of February 24, 1905 (33 Stat., 813), relating to lands in the Mobile and Girard railroad grants in Alabama, and the act of July 1, 1898 (30 Stat., 597, 620), relating to conflicts between settlers and the Northern Pacific Railroad Company. While no particular case is cited under the act of 1898, reference is made to the instructions issued under said act, and the case of James A. Bryars (34 L. D., 517), under the act of 1905, is referred to as authority in support of appellant's contention.

While it is true that the acts relating to the Mobile and Girard railroad grant and the Northern Pacific railroad grant are similar in many respects to the act under consideration, upon careful examination it will be seen that in other respects they differ materially. The two acts cited grant the privilege of transferring the homestead claim to other lands, while the act under consideration, as shown above, merely provides that duly qualified settlers in making final proof upon homestead entries for other lands shall "be given credit for the period of their *bona fide* residence upon and the amount of their improvements made on the lands for which they were unable to complete title." Again, the act under consideration provided further that it shall not entitle any person to make another homestead entry who shall have received the benefits of the homestead law since being prevented from completing title to the lands originally settled upon by him.

After the passage of the act of 1904 Juski had the privilege of entering under the homestead law 160 acres of public land, wherever he might find it, and of acquiring title thereto without either residing upon or cultivating it. This privilege was granted him by Congress

because of the fact that he had been induced by an erroneous decision of this Department to make a homestead entry for railroad lands in Wisconsin and had resided upon and cultivated the land for the period of time required by the homestead law. In exercising this privilege Juski elected to enter 120 acres of land in Michigan. In making this election he was in no way influenced by the government. It is true he may not have been able to find in that section of the country more than 120 acres of contiguous tracts; at the same time, however, it was of his own volition that he entered the lands in Michigan and did not go elsewhere where the full quota of 160 acres might have been found. This Department has always held that the homestead right is exhausted by the making of one entry, whether it be for the full quantity to which the entryman is entitled or for less, and whether, indeed, the title is afterwards acquired or not. That such has also been the view of Congress is clearly shown by the supplemental legislation enacted for the relief of persons who have entered homesteads and have lost or forfeited the same; and, also, by the supplemental legislation providing for additional homestead entries.

The sixth section of the act of March 2, 1889 (25 Stat., 854), while granting a person the right to make a second homestead entry where he has entered and acquired title to less than 160 acres, plainly provides that in no case shall patent issue for the land covered by the additional entry until the person making such additional entry shall have actually and in conformity with the homestead law, resided upon and cultivated the lands so additionally entered. This provision of the law fully answers contention of counsel that Congress does not require a man to reside ten years upon public land in order to acquire title to 160 acres under the homestead laws.

The case of James A. Bryars, *supra*, arising under the act of 1905, cited by counsel, is not in point. Indeed, it was held in that case that while the entryman in transferring his homestead claim should not be required to select contiguous tracts, it was expressly held that the transfer should be limited to one entry. In the case under consideration the applicant did not attempt to locate noncontiguous tracts by the making of one entry; indeed, that could not have been done in this case because one tract was located in Michigan, while the other tract—for which application is made—is situated in Wyoming.

That provision of the act of 1908 under consideration which declares that the act shall not be considered as entitling any person to make another homestead entry who shall have received the benefits of the homestead law since being prevented from completing title to the lands originally settled upon by him, is conclusive of the disposition of this case without regard to what may have been done by the Department under other acts of Congress passed for

like purposes but which do not contain such a provision. Juski unquestionably had received the benefits of the homestead law in acquiring title to 120 acres of land in Michigan. He is not, therefore, entitled to acquire additional land in Wyoming under the act of 1908.

Your office decision is affirmed.

PRIOR SETTLEMENT CLAIM—RESIDENCE DURING PENDENCY OF CONTEST PROCEEDINGS.

SHAW v. RUSSELL.

Where one claiming to be a prior settler institutes proceedings against an entry made subsequent to his alleged settlement, he must reside upon the land during the pendency of the controversy; and should he fail to do so, the entryman, if he in the meantime continues residence thereon, will have the superior right.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, October 27, 1909.* (J. H. T.)

December 26, 1905, Henry J. Shaw made homestead entry for the NE. $\frac{1}{4}$, Sec. 33, T. 98 N., R. 73 W., Mitchell (now Gregory), South Dakota, land district. January 16, 1906, Michael H. Russell filed in the local land office his application to make homestead entry for the same tract, alleging prior settlement thereon. A hearing was ordered to be held February 23, 1906. The hearing was duly had and the local officers found in favor of Russell. It was shown that Shaw made entry for the land with full knowledge that Russell, or some other person, was claiming a right thereto; that Shaw bargained with Russell for the sale of the land, agreeing to pay \$700 as the purchase price and to secure the same with chattel mortgage on certain live stock; that Russell had made settlement and claim to the land on October 13, 1905; that he started the erection of his house on October 15, 1905, sodded it up on the outside, broke a fire guard around same, started to dig a well, and that he commenced an alleged residence on January 8, 1906. Your office and the Department also found that Russell had prior and superior right to the land and the case was finally closed and Shaw's entry canceled, February 25, 1908. Russell tendered his application to make entry for the land, February 25, 1908. March 2, 1908, the said Henry J. Shaw filed an affidavit of contest against the said entry of Russell, wherein it was alleged that Russell had failed to reside upon, cultivate, or improve the land from April 20, 1906, to December, 1907. Hearing was had upon the contest and the local officers recommended that the Russell entry be allowed to remain intact. By your office decision of May 19, 1909,

you reversed the action of the local officers and held for cancellation the said entry of Russell, stating as a reason therefor that—

Testimony in the case conclusively established that Shaw moved on the land with his family on April 20, 1906, within six months from the date of his entry, and that he has continuously resided there ever since, cultivating a portion of the land and making numerous and valuable improvements. Hearing on the former contest of Russell on the claim of prior settlement was had February 23, 1906, prior to the time Shaw established his residence on the land, and Shaw's entry was canceled solely on the ground that Russell was the prior settler. During the pendency of that contest it was incumbent upon Russell to maintain the continuity of his residence. See *McCalla v. Acker* (29 L. D., 203). The testimony in the case clearly shows that Russell resided in Gregory, South Dakota, during the years 1906 and 1907, where he was engaged in the real estate business. Gregory is at least three miles distant from the land. During that time he was seen on the land at infrequent intervals when he made visits to the same. He had a shack on the land but it was locked with a padlock practically all the time. He made no attempt to cultivate the land and no other conclusion is possible than that he failed to comply with the requirements of the homestead law from April, 1906, to December, 1907.

An appeal by Russell brings the case before the Department for decision.

Claims under the homestead law may be initiated either by settlement or entry, and the person initiating such claim must continue to comply with the law. An alleged prior settler proceeding against an entry made subsequent to his settlement must continue residence upon the land claimed, otherwise the entryman who has continued his residence will have a superior right to the land. *Mary E. Coffin* (34 L. D., 298); *Gardner v. Claypool* (27 L. D., 562); *Rowan v. Kane* (26 L. D., 341); *Benjamin v. Eudaily* (25 L. D., 103); *Thompson et al. v. Craver* (25 L. D., 279); *Griffin v. Smith* (25 L. D., 329).

A number of court decisions have been cited which, it is claimed, support the contention here made that a person who has an existing homestead entry of record has the right to exclusive possession of all of the land embraced in the entry, even against a prior settler qualified and intending to make entry and who is not in default in making application for the land within the time required by law, and that it follows that the settler could not maintain his residence under such circumstances. The principal cases cited to support this view are the following: *Kinney v. Degman* (11 N. W., 318); *Reservation State Bank v. Holst* (95 N. W., 931).

Said cases have been carefully examined and also the other cases cited, and it is found that the facts presented in said cases were unlike the facts presented in this case, and the said decisions cited do not, for that reason, furnish authority for the contention made by the defendant in this case. In fact some of the decisions cited by appellant are, when closely considered, found to express opinion directly opposed to the view insisted upon by him. For instance, in

the case of *Tiernan v. Miller & Leith* (96 N. W., 661), cited by appellant, the following language is used *inter alia*:

There is a class of cases of which the courts take jurisdiction to protect and preserve the possessory rights of parties who have entered upon government land and who can connect themselves with the land by some color of title or possessory claim or right under some statute of the United States with a view of entering it as a homestead or preemption claim. Where two parties claim such right of possession the courts will interfere to protect the party whose right was first acquired and while the question of priority between the parties is being determined by the land department of the general government. Could the plaintiff in this action show that he was in possession of this land under any claim of homestead or preemption, or any other right growing out of public land laws, the court would protect his possession until the land department of the general government examined the case and determined that such possession was subordinate to that of the party seeking to oust him. But the facts in this case are the reverse of what is necessary to give the court jurisdiction. Plaintiff, without claim or right to the land, is seeking to enjoin those who claim under a homestead entry made at the proper land office of the United States from taking possession and is asking the court to usurp the exclusive jurisdiction of the land department by declaring fraudulent and void homestead entries allowed by that department. This the court has not power to do.

The law relating to the right of possession, under such circumstances, was clearly and correctly stated in the case of *Glover v. Swartz* (58 Pac., 943), as follows:

One who is in good faith contesting a homestead entry upon the grounds of prior settlement and is residing upon the land in controversy will be permitted to occupy the land in controversy until the land department shall finally determine which of the claimants has the superior right to the land. The courts will then give effect to such decision by requiring the unsuccessful or defeated claimant to surrender possession of the land to the one to whom the land department has awarded it.

Some evidence was introduced at the hearing showing that Shaw had at one time stopped a man sent by Russell from plowing upon the land involved. He also prevented rock from being taken from the land by a man who had been granted permission by Russell to take the rock. However, Russell acknowledged that he had not personally been interfered with and instead of claiming excuse for absence, he endeavored to show that he had actually maintained residence upon the land. In view of the record, it is not believed that it should be held that Russell was prevented by Shaw from maintaining residence. Russell could not maintain residence by proxy and the men sent by him had no right to be on the land, as they were mere trespassers, unless Russell was in fact a *bona fide* resident thereon.

The record shows that while Russell did perform certain acts of settlement and made a pretense of establishing and maintaining residence, yet he never did establish a *bona fide* residence nor continue to occupy the land, as required by law. In the former contest it was held that he had performed such acts with reference to the land as

prevented valid entry of same by Shaw. It is now shown, however, that the initiation of his claim was not properly followed up by *bona fide* residence. Being thus in default, the claim of Shaw, who has maintained a continuous *bona fide* residence, is superior.

Your decision holding for cancellation the entry of Russell is affirmed.

SURVEYS OF HOMESTEAD ENTRIES WITHIN NATIONAL FORESTS.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 16, 1909.

UNITED STATES SURVEYORS-GENERAL.

SIRS: Referring to the act of June 11, 1906 (34 Stat., 233), as amended by the acts of February 8, 1907 (34 Stat., 883), and May 30, 1908 (35 Stat., 554), and to circular dated December 16, 1908 (37 L. D., 355), relating to homestead entries within national forests, you are now instructed as follows:

1. Applications to your office for survey of homestead entries within national forests under the stated acts, duly signed and dated, should, to form a sufficient basis for your action, state the entry by date, number, local land office, and name of entryman, whether the tract as listed has been marked on the ground by the Forest Service, the metes and bounds desired by the entryman, and the name and address of the surveyor he wishes you to instruct. If known to the entryman, he should state also the location of the claim by section, township, and range, and whether these are surveyed or unsurveyed, and the number and date of listing. He should also submit temporarily the receiver's receipt for your information as to matters stated therein.

2. Upon receipt of an application for survey, you will consult the records of your office, especially as to conflicts, either known or probable, of the survey as applied for, with mineral and other surveys as approved and, if advisable, correspond with the local land office.

3. When the application is completed and in proper form you will submit it to this office, with illustrative sketches when needed and appropriate remarks. List conflicting approved mineral surveys, that you may be advised which of these are patented and therefore to be excluded from the entry survey. Should it appear that the latter is separated into detached portions by a patented claim, explicitly state the fact.

4. As promptly as practicable, the application will be considered, descriptions verified, the legality of the entry determined, and your office instructed.

5. Upon instruction from this office to proceed, you will call upon the applicant to make the requisite deposit in the usual manner for work in your office, on the survey, and submit to you the usual evidence thereof; on receipt of which you will issue necessary and sufficient instructions to the surveyor designated by him, of whose fidelity and skill you should carefully assure yourself, inasmuch as it is not intended at present to make field examinations of these surveys. It will be explicitly stated in each case that the surveyor must look to the applicant for all compensation, as the United States assumes no liability by reason of the instructions.

6. The instructions should state the application, listing, and entry, with dates, numbers, and local land office. They will prescribe a survey in strict conformity with or "embraced within the area described in the listing and entry," the descriptions in which and in the survey application you will furnish to the surveyor; and the field notes must show and explicitly state such conformity or inclusion, with descriptions and positions of corners and other markings of the listed tract by the Forest Service. You will also furnish the surveyor with such other requisite information as the records of your office afford.

7. Many of the requirements in the Mineral Manual approved October 6, 1908, are eminently applicable to these entry surveys, and the principles and purposes underlying them should have appropriate recognition in the instructions you issue. Such are the general remarks on pages 6 and 7, those on fieldwork in section 8, on survey in section 10, and on instrument, connections, meridian, locating monuments, and corners (except as already provided in section 10 of said circular) on pages 10 to 14. Topography prescribed by section 24 should be supplemented for the purpose of these surveys by a sufficient account of improvements. The noting of conflicts, section 25, should embrace all claims of any nature whatever, whether surveyed or unsurveyed; and when thereby presumption is raised as to the mineral character of lands included in the survey, the field notes should be specific as to facts bearing on the question. Sections 27 and 31 have valuable suggestions in respect of field notes.

8. Determination of the position of the entry survey relative to accepted section boundaries as these exist on the ground, including intersections prescribed in section 15 of the stated manual, is incident to a complete survey. It implies justifying retracements, resurveys, and restorations, and possibly a limited section subdivision. Under normal conditions these will not be excessive. When obliteration of corners or gross inaccuracies in surveys are developed to such an extent as to require extended retracements, with attendant uncertainties in results and possible complications, you may deem it best, in the exercise of a sound discretion, to restrict this requirement and resort

to methods stated in section 14 of the stated manual. But in these cases the field notes should fully show conditions found by the surveyor justifying your action, and these should be represented on the entry-survey plat in a distinctive manner for future use.

9. These surveys being agricultural, distances should be returned in chains and links. Limits of closings may be set at 1-320th, or 25 links per mile. Closing corners should be established at intersections of the entry survey with surveyed section boundaries and included in the prescribed series of consecutive corner numbers. The surveyor should be provided with a copy of office circular on "Restoration of lost and obliterated corners," issue of June 1, 1909 (38 L. D., 1), and its use instructed when necessary.

10. Field notes must be verified by the affidavits of assistants and surveyor, that of the latter to be executed before an officer qualified to administer oaths and having a seal.

11. The preparation of proper instructions for survey and returns is confided to you without formal submission to this office.

12. Plats will be prepared, to a suitable scale, on sheets of the size and with border prescribed for regular township plats. In addition to the entry survey, with its associated retracements and resurveys designated as such, the plat will indicate adjacent and contiguous surveys. Surveyed sections will be shown with courses and distances. If the section survey is approved by you, existing subdivisions therein will be shown without areas. Unsurveyed section lines will be appropriately indicated if their positions can be protracted with reasonable certainty. The status of surveys and protractions should be definitely stated, for instance, as patented, accepted, suspended, unsurveyed, etc., as the case may be.

13. Segregations will not appear on the entry-survey plat, but after patent will be shown on the township plats subsequently approved; and in these cases small portions of legal subdivisions consequent on segregations of patented mineral claims, that may be included in adjacent lots created by the entry survey, should be so included if the resulting lot is of proper form and area. (See page 74 of manual of 1902.)

14. In convenient form the plat will state the entry on which the survey is based, by date, number, and local land office, and the surveys, agricultural and mineral, directly involved, with names of deputies, dates of contracts, special instructions, orders, execution, and approvals. A table of areas should list conflicts, if any, and portions in each section, when known, and total area.

15. Plats will be prepared in quadruplicate and two transcripts of field notes. The original plat and field notes will remain in your files. The duplicate plat and one transcript will be transmitted to this office; they will be deemed to be the plat and field notes pre-

scribed in the stated act to be filed by the entryman, and will be so referred to in his final proof. Upon advice of this office, which will be considered by you as an approval of your action (acceptance of the survey not being thought advisable, as the entry as surveyed may not be decided patentable), you will transmit the triplicate plat and one transcript to the proper local land office for its files and the quadruplicate plat to the entryman for posting on the claim, as required by said act.

16. When the triplicate plat is filed, you will notify the Forest Supervisor of the fact; a plat need not be sent, as the forest officers will have access to the entryman's quadruplicate.

17. Section 10 of the stated circular of December 16, 1908, *supra*, is hereby modified in accordance with the foregoing.

18. As opportunity presents, you should endeavor to protect applicants from exorbitant survey charges by furnishing them with lists of deputy, mineral, and other surveyors, and in other legitimate ways assist them in this matter, with which they are not familiar. You may properly suggest that their arrangements with surveyors should be conditioned on surveys and returns being acceptable to you. But your office will carefully refrain from directly or indirectly influencing their choice of surveyors.

19. In all correspondence relating to survey applications and action thereon mention should be made, in the body of the letter only, to entry by date, number, local land office, and name of entryman, for convenient office reference.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

FRANK PIERCE,
Acting Secretary.

PLACER MINING CLAIM—LOCATION BY CORPORATION.

IGO BRIDGE EXTENSION PLACER.

A corporation, regardless of the number of its stockholders, may lawfully locate no greater placer area under the mining laws than is allowable in the case of a single natural person, namely, 20 acres.

First Assistant Secretary Pierce to the Commissioner of the General
(O. L.) *Land Office, November 2, 1909.* (F. H. B.)

December 5, 1908, the Redding Gold and Copper Mining Company, a corporation existing under and by virtue of the laws of South Dakota, made entry (No. 0389) for the Igo Bridge Extension placer mining claim and the Four Mile Bar Copper lode claim, in the Redding, California, land district, the placer claim comprising lots 1 and

8, Sec. 27, and the S. $\frac{1}{2}$ NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, and S. $\frac{1}{2}$ SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 26, T. 31 N., R. 6 W., M. D. M., and embracing an area, as applied for and entered, of 151.19 acres.

Upon receipt and examination of the record in due course, your office, by decision of June 12, 1909, found that the placer claim had been located by the corporation, April 6, 1906, and, citing the cases of *McKinley v. Wheeler* (130 U. S., 630), *United States v. Trinidad Coal Co.* (137 U. S., 160), and *Miller v. Chrisman* (73 Pac. Rep., 1083), held that a corporation, regardless of the number of its stockholders, could lawfully locate no greater placer area than is allowable in the case of a single natural person, namely, twenty acres. The local officers were accordingly directed to—

allow claimant sixty days from notice within which to show cause why the Igo Bridge Extension placer should not be canceled to the extent of all but the twenty acres thereof upon which discovery shall be shown to have been made and upon which sufficient improvements appear; and, in event that said twenty acres of placer ground are thereby rendered non-contiguous with the Four Mile Bar Copper lode, claimant will be required to elect upon which thereof it wishes to proceed to patent.

Instead, the company has appealed to the Department, and urges and relies upon a contrary view of the law as to the area it may properly locate.

Neither of the cases so cited by your office involved the question now presented, nor does either of them directly or in principle sustain the conclusion expressed in that connection. In fact, as far as the Department is aware, the question has never been passed upon by any court. Nevertheless, it is believed that the view taken by your office must be sustained.

Whilst, in a sense, a corporation represents an association of persons for the accomplishment of some purpose, it is in legal contemplation but one artificial person, the rights and liabilities of which, as such, are unaffected by changes of membership. It is in the corporate entity that the legal title to the corporate property vests, the shareholders having only the beneficial interest therein. What may well be taken as a statutory coincidence with this view in this case is that, whereas section 2319, Revised Statutes, restricts the right of exploration and purchase of the public mineral lands to citizens of the United States and those who have declared their intention to become such, section 2321 on the one hand requires that there be shown such citizenship in every member of an "association of persons unincorporated," and on the other hand accepts as proof of citizenship in the case of any domestic corporation a certified copy of its charter or certificate of incorporation. So, too, the distinction is implied by section 2325, which confers upon every "person, association, or corporation authorized to locate a claim," upon full compliance with the law, the right to apply for patent. The reasonable

conclusion is that, within the legislative contemplation, whenever a corporation locates a lode or placer claim under the mining laws, it does so in its strictly corporate capacity, and that it is with respect to it as a corporate entity, rather than in the collective capacity of the stockholders, that the provisions of those laws should be applied. Inasmuch, therefore, as the privilege of placer locations in excess of twenty acres each, according to the scale prescribed, is extended only to associations of persons (which the terms of section 2321 seem by clear implication to confine to those associations which are "unincorporated"), and a corporation is not in that behalf properly to be so regarded, the maximum location allowable in such a case is of twenty acres.

This is in no wise inconsistent with the departmental decisions whereunder, as one of the essential conditions of an entry by a corporation under the desert-land law, the individual qualifications of every stockholder must be shown. The requirement is made necessary in such a case to prevent an evasion, through the device and under the cover of incorporation, by those who theretofore have exhausted their desert-land rights, of the limitations imposed by that law (limitations which do not obtain under the lode and placer laws), and not upon the theory that the corporation is for that purpose to be regarded purely as an association of persons. *J. H. McKnight Co.* (34 L. D., 443) and cases therein cited. Upon the same ground the requirement is imposed in the case of a corporate enjoyment of the privileges of the reclamation act. *Williston Land Co.* (37 L. D., 428).

For the foregoing reasons the appellant company must be required to reduce the area of its placer claim to twenty acres; which should be so done as to preserve existing rights under the entry, and the entry will thereupon be amended accordingly.

In one particular, however, under the circumstances, the Department does not concur in the order rendered by your office, as quoted above. The lode claim included in the pending entry is within the limits of the full placer area as entered by the appellant, is so included as a lode within a placer, and has been delimited as such in accordance with paragraph 26 of the official mining regulations (37 L. D., 757, 761). Without deciding more, it is the opinion of the Department that, the excessive placer location having been made as it was in apparent good faith and under a mistaken view of the law, and there being no question of a common improvement in the case, the circumstances would not justify the further amendment of the entry by the total elimination of one claim or the other in the event that the reduction of the placer, conformably to the foregoing holding, should render the two claims non-contiguous.

The decision of your office is modified accordingly.

NOTATION OF RIGHTS OF WAY ON ORIGINAL AND FINAL ENTRY PAPERS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 3, 1909.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: In order that all persons making entry of public lands which are affected by rights of way may have actual notice thereof, you are directed to note upon the original entry papers and upon the receiver's receipt issued to the entryman a reference to such right of way. You will make no such notation upon the final entry papers unless the right of way has been granted under an act of Congress which does not in terms protect the grantee against subsequent adverse rights, in which case you will place the same notation as to right of way upon the final entry papers, so that the reservation of the right of way will be made in the patent when issued. (23 L. D., 67.)

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

R. A. BALLINGER, *Secretary.*

MINNESOTA SWAMP GRANT—RETURN OF SURVEYOR OVERCOME BY EVIDENCE.

STATE OF MINNESOTA *v.* CAVASIN.

Under the rule of evidence adopted for the adjustment of the swamp grant to the State of Minnesota the field notes of survey as a rule govern in determining the character of land claimed by the State under its grant; but where in a controversy between the State and one claiming adversely by virtue of settlement prior to survey, the return of the surveyor showing the land to be swamp is overcome by evidence adduced at a hearing to determine its true character, the State's claim under its grant can in no event be allowed, regardless of the final disposition that may be made of the adverse claim.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, November 3, 1909.* (S. W. W.)

This case is before the Department upon the appeal of the State of Minnesota from your office decision of May 1, 1909, rejecting its claim under the swamp land grant of March 12, 1860 (12 Stat., 3),

to the N. $\frac{1}{2}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 35, T. 57 N., R. 10 W., Duluth, Minnesota, land district.

It appears that the township in which this land is situated was surveyed in December, 1905, and January, 1906, the plat of which was approved August 1, 1906, and officially filed in the local office November 15 following; that the tracts described, having been shown by the return of the surveyor to be swamp land, were included in swamp land list No. 159; reported October 5, 1906; that Jerry Cava-sin applied to make homestead entry for said tracts, together with the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of said section, and having alleged settlement prior to the date of the survey, was allowed, November 15, 1906, to make homestead entry No. 22544 for said tracts, subject to the swamp land claim of the State to the N. $\frac{1}{2}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$.

This entry was allowed in accordance with the practice obtaining at that time, under which homestead applicants who alleged settle-ment prior to survey on lands thereafter returned by the field notes as swamp, were allowed to make entry subject to the claim of the State, which rule has since been modified so as to provide that the entry is not allowed until after the applicant has proved the errone-ous return of the surveyor. (*Lampi v. State of Minnesota*, 37 L. D., 385.)

The entry having been allowed, as above stated, and the State upon notice having protested against the same and applied for a hearing, notices therefor issued August 2, 1907, citing the parties before the local office October 21 following, on which day and the days follow-ing the hearing was duly had, the entryman being present in person and by attorney and the State being also properly represented. The register and receiver found in their decision of January 13, 1909, that Cava-sin made a *bona fide* settlement on the land and established residence thereon in the month of April, 1905, from which date up to the day of hearing he had maintained an actual home on the land to the exclusion of one elsewhere; and of the three tracts in contro-versy they found the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ to be dry land, or not swamp within the meaning of the grant; and the two tracts constituting the N. $\frac{1}{2}$ NE. $\frac{1}{4}$ they found to be swamp and unfit for cultivation with-out artificial drainage or embankment. They accordingly recom-mended that the swamp-land claim of the State to the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ be rejected, and that the homestead entry be canceled to the extent of the N. $\frac{1}{2}$ NE. $\frac{1}{4}$.

The entryman appealed to your office, where it was held in the decision under consideration that the preponderance of the testimony submitted at the hearing, taken in connection with the plat of sur-vey, showed the greater part of each of the tracts in controversy not to be swamp or overflowed land unfit for cultivation without artifi-cial reclamation, within the meaning of the swamp land grant. You

accordingly reversed the decision of the local office as to the N. $\frac{1}{2}$ NE. $\frac{1}{4}$ and held the State's claim for rejection. As above stated, the appeal of the State brings the case before the Department.

While the State did not appeal from the decision of the register and receiver which found the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ to be dry land, it is contended in the appeal that if the finding of the register and receiver should be affirmed and the N. $\frac{1}{2}$ NE. $\frac{1}{4}$ eliminated from the entry, there would remain two noncontiguous tracts, and it is suggested that the homestead entry should not be allowed to remain of record for such tracts. The State maintains, moreover, that the evidence submitted at the hearing shows that Cavašin was not an actual *bona fide* resident upon the land embraced in his homestead entry; that he was occupied during most of the time that he was supposed to be on the land as a bartender in the city of Duluth; that he spent only short periods on the homestead, and had not fully complied with the requirements of the law respecting residence and cultivation. It is urged on behalf of the State, therefore, that the homestead entry should be canceled to the extent of the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ as well as the N. $\frac{1}{2}$ NE. $\frac{1}{4}$, as recommended by the register and receiver, and that upon the cancellation of the entry the claim of the State should be allowed.

After considering the testimony submitted in this case the Department is disposed to concur in the finding of the register and receiver, namely, that of the three tracts concerning which testimony was submitted, the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ was clearly shown to be dry land; while, on the other hand, the two tracts constituting the N. $\frac{1}{2}$ NE. $\frac{1}{4}$ were shown by the testimony to be swamp as to the greater portions thereof. While three witnesses, including the entryman, testified in behalf of the homestead claimant as to the character of the land, it is observed that each of the witnesses had made a homestead entry for land in the vicinity, and was therefore naturally more or less interested in the questions at issue. However, even these witnesses admitted that the land was covered by a deep growth of moss which is shown by the record to be such as grows chiefly, if not exclusively, on land which is swampy or very wet. The witnesses who testified in behalf of the State were men who had no interest in the subject-matter and who examined every part of the three tracts involved, and their testimony shows that while the three tracts were returned by the surveyor as swamp, the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ is, in fact, not swamp.

It is therefore held that the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ of said section should be eliminated from the State's swamp claim and that the homestead entry of Cavašin must be canceled as to the N. $\frac{1}{2}$ NE. $\frac{1}{4}$. This will leave the two remaining tracts embraced in the entry noncontiguous, but under the decisions the entry may be allowed to embrace such tracts, and upon the submission of satisfactory final proof, should

be submitted to the Board of Equitable Adjudication. See *De Simas v. Pereira* (29 L. D., 721), and cases cited.

However, the Department is by no means satisfied from the testimony submitted that Cavašin, after making settlement on the land in 1905, maintained continuous residence thereon. The evidence shows that he spent a great deal of time in the city, where he had more or less regular employment; and should he offer final proof, it must be closely scrutinized. If Cavašin should conclude not to retain his entry, reduced as it is by this decision, or if it is canceled *in toto* for any reason, in no event may the State's swamp claim to the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ be allowed. Under the rule of evidence applicable to this case, that tract is clearly shown to be high and dry land; and thus the return of the surveyor is overcome.

As a rule of evidence to determine the character of land in Minnesota the Department has decided that the field notes of survey must govern as a general rule (32 L. D., 65), but inasmuch as there may be honest differences of opinion as to whether or not a tract of land is swamp, and as it is also possible that the return of the surveyor will in some cases be erroneous, it would be eminently inequitable to apply the rule in cases where lands were settled upon or located prior to survey; hence, the Department has modified the general rule laid down in 32 L. D., 65, and held that the same should not be applicable where the right of the adverse claimant was initiated prior to the survey (35 L. D., 58). When, therefore, a hearing has been had in accordance with the regulations, and testimony submitted as to the character of the land, the interested parties must be controlled by the determination reached from the testimony so submitted, and the mere fact that a tract of land was erroneously returned by the surveyor as swamp will not be allowed to overcome the positive and undisputed testimony submitted at a hearing which showed the land to be not of the character contemplated by the swamp land grant. Therefore, regardless of the final disposition that may be made of the homestead claim, the NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of said section 35, can in no event be patented to the State.

Your office decision is reversed.

APPLICATIONS AND SELECTIONS FOR AND FILINGS AND LOCATIONS
UPON UNSURVEYED LANDS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., November 3, 1909.

REGISTERS AND RECEIVERS,

United States Land Offices.

GENTLEMEN: To remedy the confusion and uncertainty arising from applications and selections for and filings and locations upon

unsurveyed public lands, you will hereafter reject any such application, selection, filing, or location, under whatsoever law permitted, unless it conforms to the following rules:

1. It must contain a description of the land by metes and bounds, with courses, distances, and reference to monuments by which the location of the tract on the ground can be readily and accurately ascertained. The monuments may be of iron or stone, or of substantial posts well planted in the ground, or of trees or natural objects of a permanent nature, and all monuments shall be surrounded with mounds of stone, or earth when stones are not accessible, and must be plainly marked to indicate with certainty the claim to the tract located. The land must be taken in rectangular form, if practicable, and the lines thereof follow the cardinal points of the compass unless one or more of the boundaries be a stream or other fixed object. In the latter event only the approximate course and distance along such stream or object need be given, but the other boundaries must be definitely stated; and the designation of narrow strips of land along streams, water courses, or other natural objects will not be permitted.

2. The approximate description of the land, by section, township, and range, as it will appear when surveyed must be furnished; or, if this can not be done, an affidavit must be filed setting forth a valid reason therefor.

3. The address of the claimant must be given, and it shall be the duty of the register and receiver, upon the filing of the township plat in their office, to notify him thereof, by registered letter, at such address, and to require the adjustment of the claim to the public survey within thirty days. In default of action by the party notified the register and receiver will promptly adjust the claim and report their action to the General Land Office.

4. Notice of the application, selection, filing, or location, describing the land as directed in rule 1, must be posted in a conspicuous place upon the land, and a copy of such notice and proof of posting thereof filed with the application, selection, filing, or location, as the case may be.

5. Wherever, under existing regulations, notice of such application, selection, filing, or location is required to be posted elsewhere than upon the land and published in a newspaper, the description of the tract in the posted and published notice must conform to the requirements of rule 1.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

R. A. BALLINGER, *Secretary.*

COCHISE ELECTRIC R. R. Co. v. ARIZONA SOUTHERN Co.

Motion for review of departmental decision of July 15, 1909, 38 L. D., 74, denied by First Assistant Secretary Pierce, November 4, 1909.

MINERAL SURVEYOR—REVOCATION OF APPOINTMENT—AUTHORITY OF SURVEYOR-GENERAL.

JAMES C. KENNEDY.

The action of a surveyor-general in revoking the appointment of a mineral surveyor should not be interfered with by the General Land Office or the Department, if taken upon fair and reasonable grounds and after opportunity has been afforded the mineral surveyor to be heard.

First Assistant Secretary Pierce to the Commissioner of the General Land Office, November 6, 1909. (F. W. C.) (F. H. B.)

The appellant in this case, James C. Kennedy, was a duly appointed and bonded mineral surveyor for the district of Nevada; and it is from your office decision of July 27, 1909, which sustains the action and recommendation of the Surveyor-General for that district, in revocation of the appointment, that the pending appeal is taken.

By the record now before the Department it is disclosed that on January 9, 1909, the Surveyor-General cited the appellant to show cause why his appointment should not be revoked, stating that the "action is taken for the protection of the mining claimants of this State, and in the interests of good administration," and reciting not only that four specified surveys, executed by appellant, "have been found seriously in error," as shown by the appellant's report of errors thereon, but that the field notes thereof had been returned, in the various cases, from two to five times for correction, so "that much valuable time of the force of this office was consumed in checking and re-checking this work." Further, an utter lack of scruple on appellant's part "in reporting in error lines of approved official surveys where the same are correct, to correspond and agree with your own erroneous work," in which connection three cases are cited. A quantity of correspondence in the cases accompanies the record.

Thereafter, and by letter of June 10, 1909, the Surveyor-General advised the appellant as follows:

For reasons that I believe sufficient, and in the interest of good administration, it is not desirable that you renew your bond as a U. S. Mineral Surveyor for the district of Nevada, and your name has accordingly, this day, been dropped from the list of U. S. Mineral Surveyors for this district.

In addition to his further advice to the appellant, in the same connection, of his right of appeal, the Surveyor-General soon thereafter (June 15) communicated the facts to your office and recommended that the action taken by him be approved. The approval and the pending appeal to the Department, as above indicated, consecutively followed.

It is observed that the action of your office seems to rest more particularly upon certain reflections upon the land department which were contained in a former letter of the appellant to the Surveyor-General for Wyoming, and practically to ignore the charges preferred by the Surveyor-General for Nevada. Besides a challenge of the appropriateness of that ground, and the suggestion of considerations respecting the appointment as a means of livelihood, the appeal questions the sufficiency of the errors and the acts charged by the Surveyor-General as a basis for the revocation. It is supplemented by a brief of resident counsel, which is principally addressed to the latter proposition, and in which connection it is suggested that the case be remanded for examination and report by the surveying division of your office before final decision.

Omitting all consideration of the issue formerly between the appellant and the Surveyor-General for Wyoming, as inappropriate in this controversy, the Department is of the opinion, after examination of the correspondence and papers pertaining to the charges preferred by the Surveyor-General for Nevada, that the action taken in the latter behalf should not be disturbed here.

Section 2334, Revised Statutes, provides in part as follows:

The surveyor-general of the United States may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims.

In the course of the decision in the case of Golden Rule &c. Co. (37 L. D., 95, 99) the Department said:

The provisions of section 2334, Revised Statutes, pursuant to which mineral surveyors are appointed, expressly contemplated competency, in its broad sense, on the part of those whose services are to be called into requisition in the survey of mining claims, and therefore a reasonable assurance thereof, to the owners of mining claims who shall have occasion to employ such surveyors, from the fact of appointment under the statute. Whenever any surveyor so appointed is thereafter found to be incompetent to perform the services required of him, or so neglectful or contemptuous of the interests of his client as to fail or refuse to correct an unacceptable survey made by him which he ought to correct, it is not only the right but the duty of the appointing power to revoke his appointment, that future impositions upon others may be avoided.

Inasmuch as it is primarily upon the Surveyor-General for each district that there devolves the duty and responsibility of the appointment of mineral surveyors for the purposes and with the qualifications prescribed by the statute, and that upon him is imposed the further duty of a general supervision of their technical labors, his

approval of which is essential under the law and regulations, it is but logical and just that his judgment, if resting upon reasonable grounds, should at least go far toward controlling the revocation of any such appointment. In other words, with a fair and reasonable showing to support that result, after having afforded the mineral surveyor, to whose default no abuse of authority or prejudice on the part of the Surveyor-General has materially contributed, his opportunity to be heard, the action so taken should not be overruled by your office or the Department. Whilst this, doubtless, like any general rule, should be subject to whatever exception the casual circumstances of individual cases may require, it is believed to be essentially sound, and is in harmony with the existing mining regulations.

It is the opinion of the Department, after a full examination of the record, that the pending case is one for the application of that rule; and the decision of your office is accordingly affirmed.

STATE OF CALIFORNIA *v.* YOULES.

Motion for review of departmental decision of April 28, 1909, 37 L. D., 609, denied by First Assistant Secretary Pierce, November 6, 1909.

SELECTION UNDER ACT OF JULY 1, 1898—PREFERENCE RIGHT OF
CONTESTANT.

SCHLABSZ ET AL. *v.* SCHULZ.

The act of July 1, 1898, contemplates that the right of lieu selection accorded thereby shall be exercised by the railway company; and the presentation of such a selection by a successful contestant is not a proper exercise of his preference right of entry.

First Assistant Secretary Pierce to the Commissioner of the General
(O. L.) *Land Office, November 9, 1909..* (S. W. W.)

By letter of April 26, 1909, the Department remanded to your office for service upon the Northern Pacific Railway Company and Jacob Schlabsz the appeal of Daniel Schulz from your office decisions of January 20, and April 28, 1908, which denied his application for a hearing and held for cancellation his homestead entry No. 38516, made June 17, 1907, for lots 1 and 2, and the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 18, T. 130 N., R. 67 W., Bismarck, North Dakota, land district.

With your office letter of August 28, 1909, the papers were returned to the Department with evidence of service as above directed.

The following are the facts as presented in the record: homestead entry of Albert Bumrad, No. 12977, embracing the land involved

herein, was canceled March 15, 1907, as the result of a contest initiated by Jacob Schlabsz, to whom on April 20, 1907, notice of the cancelation of said entry, and of his resulting preference right, was mailed by the local officers and received April 25; after such cancelation, and on April 23, Daniel Schulz presented homestead application for the land, which was suspended pending action by Schlabsz under his preference right; on May 20, 1907, Schlabsz filed at the local land office a paper in which "he asks therefore to be permitted to enter the enclosed N. P. selection list upon said tract and hereby waives his preference right therefor," accompanying the same with list No. 486 of selections of public lands by the Northern Pacific Company under the act of July 1, 1898 (30 Stat., 620), covering the lands in controversy.

Because of the pendency of Schulz's homestead entry the railroad selection was suspended. On June 17, 1907, the Schulz entry was allowed, and on the day following the application of Schlabsz above set forth was denied. The railroad company took no appeal but filed disclaimer. Schlabsz appealed, responsive to which you, on January 20, 1908, held his application to file the railroad selection a proper exercise of his preference right; Schulz applied for hearing, which was on April 28, 1908, denied, with resultant appeal to this office.

At the time Schulz made his homestead entry the only obstacle to the effectiveness thereof was the preference right of Schlabsz, which it is contended was removed through express waiver by the latter.

The appeal alleges that Schlabsz did not in fact exercise his preference right of entry within the time allowed, and that the railway company had no right under the contest to exercise a preference right of entry; that Schlabsz having waived his preference right, the action of the local office in allowing Schulz's homestead entry was correct. It was also alleged in the appeal that since the allowance of his entry, Schulz has placed valuable improvements on the land.

Since the appeal was returned for service, affidavits and counter-affidavits have been filed by the respective parties, the merits of the questions raised by which, however, the Department will not consider.

In your office decision the cases of Robeson T. White (30 L. D., 61), Schelling *v.* Fuller (32 L. D., 466), and Linhart *v.* Santa Fe Pacific Railroad *et al.* (36 L. D., 41), are cited as authority for the holding of your office that the proffer of the railway company's selection under the act of 1898 in behalf of Schlabsz was a proper exercise of his preference right. Upon careful consideration, however, the Department is of the opinion that this case is not controlled by the decisions cited. The case of Linhart *v.* Santa Fe Pacific Railroad Company, *supra*, while apparently similar, will be found upon careful examination to differ materially from the case under consideration. In that case the successful contestant did not expressly waive

his preference right of entry, but within the period allowed procured the railway company to make the selection in his behalf. The right of selection exercised in that case was the right to make a lieu selection under the act of June 4, 1897 (30 Stat., 36).

In this case, while it is true that Schlabsz presented the railway company's selection at the local office and asked that it be allowed, at the same time he expressly waived his preference right of entry, clearly showing that he, at least, supposed that the company's selection could not be allowed unless accompanied by a waiver of his preference right.

The act of July 1, 1898, *supra*, provides that the railway company, upon its relinquishment of a tract coming within the provisions of the act, shall be entitled to select in lieu of the land relinquished an equal quantity of public lands, and that patent shall issue for the land so selected as though it had been originally granted. The regulations of February 14, 1899 (28 L. D., 103), issued under said act, provide, in paragraph 41 thereof, that selections made by the railroad claimant, if found satisfactory, will be certified to the Secretary of the Interior, and if approved by him will be patented to the railroad claimant as though originally granted. From this it will be seen that the act contemplates that the right of lieu selection shall be exercised by the railway company, and, in administering the act, the company is required to file lists of selections in its own name, upon which the fees required by law to be paid by railroad companies for making selections, are exacted.

It is well recognized that the preference right of entry of a successful contestant is not a right in the land which he may transfer to another but is purely personal to the contestant and not assignable (36 L. D., 80). It is fair to presume from this case that Schlabsz, the successful contestant, was not qualified in his own right to acquire the land from the government under any of the public land laws, and, admitting for the purposes of argument that the railway company's selection was presented in his behalf, he attempted to acquire title through the company and not in the exercise of any right conferred upon him by the general land laws. The register and receiver did not consider the proffer of the railway company's selection as a proper exercise of Schlabsz's preference right, and they accordingly rejected the selection presented and allowed the homestead entry of Schulz, who, in reliance upon such action, went upon the land and has continued to reside there with his family.

Under these circumstances the Department is not disposed to cancel the entry of Schulz for the purpose of allowing the selection of the land in the manner indicated. Your office decision is accordingly reversed and the homestead entry of Schulz will remain intact.

MINING CLAIM—LODE—SANDSTONE BEARING GOLD—ADMISSIBILITY
OF EVIDENCE RESPECTING TIMBER ON MINING CLAIM.

E. M. PALMER.

Sand rock, or sedimentary sandstone formation, in the general mass of the mountain, bearing gold, is rock in place bearing mineral and constitutes a vein or lode within the purview of the statute, which can be located and entered only under the law applicable to lode deposits.

At a hearing to determine the character of the land embraced in a mining claim, evidence that it bears timber is admissible as bearing upon the claimant's good faith and the weight and credibility to be attached to his testimony in the controversy.

First Assistant Secretary Pierce to the Commissioner of the General
(O. L.) *Land Office, November 10, 1909.* (E. B. C.)

E. M. Palmer, who, on December 22, 1901, made entry for the Palmer placer, embracing the S. $\frac{1}{2}$ SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 27, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, and W. $\frac{1}{2}$ NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 34, T. 10 S., R. 68 W., 6 P. M., Denver, Colorado, land district, which tracts are within Pike's Peak National Forest, has filed motions for rehearing herein, and for review of the departmental decision of June 21, 1909 (not reported); which, upon appeal, affirmed the action of your office in holding the entry for cancellation.

The claimant contends that there was error committed in failing to find and hold that the ground entered was placer mineral land; that the improvements were sufficient; and that the claim was located and entered in good faith for its placer mineral values, and not for the timber thereon. Counsel for the claimant has been heard in oral argument, and insists that fundamental error appears, first, in the holding of the local officers, who deemed the placer location to be invalid, for the reason that the small quantities of mineral found were obtained from rock in place, and that the tunnels and shafts appeared to have been constructed with a view to the discovery of lodes, and not for the purpose of placer development, and counsel argues that this erroneous view as to the non-placer character of the deposit in question has been followed in the subsequent decisions of your office and the Department. It is also urged that the evidence as to the existence of valuable timber upon the land is wholly immaterial, and likewise that a certain alleged contract of the claimant, made prior to entry, to sell the timber on the claim, is entirely irrelevant, and should not be considered for any purpose.

From the record it appears that the entry remained suspended for some time, awaiting the report of the Forestry Service as to the validity of the claim. In January, 1907, an adverse report was sub-

mitted by the forestry officer, under which proceedings were initiated upon charges as follows:

That said lands have no value whatsoever for mineral; that no work has been done thereon, no mineral exposed; that said lands are chiefly valuable for the standing timber, for which purpose it appears said entry was made.

The claimant denied the truth of these charges, and asked for a hearing, which was had May 11, 1908, at which evidence both on behalf of the Government and the claimant was submitted.

The local officers found that the claim was not a valid placer mining location, and had never been developed in good faith as such, and that the land had considerable value for its timber and little or no value as a present fact for the mineral contained therein, and they recommended that the entry be canceled.

Upon appeal, your office, November 3, 1908, decided that the evidence sustained the findings and conclusions of the local officers, and in that connection stated that it was not by any means demonstrated that the claim is such as to be legally subject to patent under the mining laws, and, also, that the charge of the forestry officer, to the effect that not more than \$300 of improvements had been placed upon the claim, appeared to be supported by the testimony. The claimant moved for a review of your decision, and his motion was, on March 10, 1909, denied. Appeal was then taken to the Department, and the decision now complained of followed, wherein it is stated that: "An examination of the records shows no reason to disturb the action appealed from, and the same is hereby affirmed."

The entire record has been reexamined. It clearly appears from the evidence that the gold obtained from the land exists in a sedimentary sandstone formation, or sand rock. The claimant himself testified that he first located the land as lode ground. His testimony, in part, is as follows:

A. I did considerable work as lode thinking it was lode ground, but I didn't discover any lode. I sunk a shaft from the bottom of a tunnel sixty feet and struck a blanket vein and all the rock in the shaft showed some values from the assay certificates that I got. The last strata of blanket vein at the bottom of the shaft showed some colors. I had it assayed and there was one assay, if I remember right of nine dollars and something. I think another one was \$6.40 and still another test showed \$1.00 which was the lowest test that I had. I had other tests made ranging from \$1.00 up to about \$9.00 but I can't recall all the tests that I had assayed. This was for gold. This blanket that I had reference to at the bottom of the shaft was soft sandstone, very easy picked. I've had other assays made on the other claims that carried values of a few dollars. The assay certificates that I had were left in a cabin and when I was away the cabin was looted and the assay certificates lost.

* * * * *

A. From the surface indications, or rather from tests that I have had made there is gold in a stratified formation, and at that time the ground was considered placer ground, by mining experts that I consulted and also attorneys.

There was a boom in mining or an excitement and many people were locating ground in this same formation as placer. Believing that the gold could be saved, the gold that was in the sandstone, mills were erected, for cyanide purposes, that is cyanide mills.

Q. Was the rock you had tested taken from the surface or from shafts?—A. It was all taken from 10 foot holes and shafts and location work that I have done.

Q. All the samples were of rock or of sandstone, were they not?—A. Yes sir.

Q. Did you ever make any gravel, sand or earth pannings for placer gold on these claims?—A. Yes sir.

Q. What did you find?—A. I found the best results in the bottom of the shaft. I got some colors.

Q. Was not these colors obtained from rock?—A. From soft sandstone.

Q. How much placer gold did you sell, who to and how much did you receive for it?—A. I hauled a wagon load of rock to one of those mills up there and he run it through his mill and gave me back a gold button that he said he took out of the rock. I took that gold button and sold it I believe for about \$6.00.

Q. What class of rock was this button taken from?—A. Sandstone.

The evidence of the other witnesses on behalf of the entryman is corroborative of his statements as to the character of the formation. Both express the opinion that it is placer ground, and not lode, while the two witnesses for the Government consider the formation to be rock in place, and therefore lode. The question as to the class to which a particular mineral deposit is to be referred is vital, and must be determined when arising in patent proceedings. The courts have had occasion to discuss this matter in numerous cases. Several of the leading authorities upon this matter are cited in *Henderson et al. v. Fulton*, 35 L. D., 652, where a marble deposit, valuable for building purposes, was involved, and had been entered under the lode mining laws. The Department there decided that such a deposit was properly to be located and entered only under the placer mining law, and accordingly directed that the lode entry be canceled.

Mining Engineer R. H. Stretch, in his very practical work on mines (1907), observes (page 73):

For the purposes of U. S. Land Offices, the description of a lode, as given by Justice Field in the celebrated case of the *Eureka Cons. Co. v. The Richmond Co.*, is accepted, viz: "We are of opinion, therefore, that the term (lode) as used in the acts of Congress is applicable to any zone or belt of mineralized rock, lying within boundaries clearly separating it from the neighboring rocks." This distinction evidently covers both true veins and all bedded deposits.

In the case of *Meydenbauer v. Stevens et al.*, 78 Fed. Rep., 787, the District Court of Alaska defined a lode substantially as follows (syllabus):

A lode is a zone, belt, or body of quartz or other rock lodged in the earth's crust, and presenting two essential and inherent characteristics, viz: (1) It must be held "in place" within or by the adjoining country rock; and (2) it must be impregnated with some of the minerals or valuable deposits mentioned in the statute.

The finding of such a belt, zone, or body is a discovery, within the meaning of the statute, and will authorize the location of a lode claim.

From the reasoning of the authorities cited it follows that sand rock, or sedimentary sandstone formation, in the general mass of the mountain bearing gold such as is here disclosed by the evidence, is rock in place bearing mineral, and constitutes a vein or lode, within the purview of the statute, and can be located and entered only under the law applicable to lode deposits. The Department is convinced that the deposit described in the testimony in this case falls well within the category of lode deposits under the mining statutes, and that such a deposit can not lawfully be appropriated or patented under those portions of the statute which apply to placer claims.

The showing submitted by the applicant as to improvements can not be accepted, and is clearly insufficient. The 120-acre tract covered by the entry was formerly embraced in six separate placer mining locations, which were, early in 1900, all conveyed to the claimant, Palmer. June 1, 1900, Palmer and five associates made a single location covering the same ground, and designated it as the Palmer Placer Claim. June 28, 1900, his co-owners conveyed their interests therein to him, and on July 28, following, Palmer verified his application for patent, which recites that the improvements made upon said claim by the applicant and his grantors consist of various tunnels, shafts, drifts and cuts, of the aggregate value of \$3,590, and the dimensions of these improvements are specifically stated, but the locus of the same is not described or fixed upon the ground. The application for patent was filed August 17, 1900, and notice was published August 24 to October 26, 1900. While it is not a physical impossibility that these improvements were constructed between June 1 and July 28, 1900; it is highly improbable that they were, and the claimant has failed to show that such was the case. Furthermore, he has not shown that between June 1, 1900, and the last of October, following, when the period of publication expired, \$500 worth of labor had been performed for improvements made upon or for the benefit of the location. The Mining Regulations, paragraph 25, provide that the proof of expenditures made by the applicant or his grantors upon a placer claim taken by legal subdivisions, should con-

sist of the affidavits of two or more disinterested witnesses, and such showing the claimant has failed to submit.

The fact that a mining claim bears timber, while not determinative of the question of its mineral character, is a proper element of proof, and admissible in evidence as bearing upon the applicant's good faith and the weight and credibility to be attached to his testimony in the controversy. Evidence relating to the alleged contract for the sale of timber from the mining claim was equally permissible for the purpose above stated.

In support of the motion for further hearing five affidavits have been filed. These affidavits, so far as they set forth statements of facts, are but cumulative as to matters already in the record, and serve but to show that it was a practice to locate as placer the formation found in that vicinity. The several affiants express their opinion to the effect that Palmer acted in entire good faith in making his entry for the land, and that the same is valuable placer mining ground. The Department is not persuaded that, were all the averments made in these affidavits, regularly submitted in evidence at a hearing, a different conclusion could be reached from that already announced.

The motion for review and the motion for rehearing are accordingly denied, and the former adjudication calling for the cancellation of the entry is adhered to, for the reasons above set forth.

STATE SELECTION—SCHOOL INDEMNITY—PREFERENCE RIGHT OF
STATE—CONTEST.

STATE OF WASHINGTON *v.* THOMPSON ET AL.

Where a State within the preference right period accorded by the act of March 3, 1893, proffers a selection, which is rejected because the land is embraced within a homestead entry allowed upon a settlement prior to survey, and the State, within the time allowed for appeal but after the expiration of the preference right period, takes an appeal from the rejection of its application and files an affidavit attacking the validity of the settlement claim, the right of the State to proceed under its contest is superior to the right of an individual under a contest initiated against the entry within the preference right period and prior to the filing of the selection by the State.

*First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) Land Office, November 11, 1909. (S. W. W.)*

This is the appeal of Fred C. Werner from your office decision of April 13, 1909, holding that the State of Washington has the prior right to contest the homestead entry of Kate Thompson, No. 19478, Serial 01234, made February 7, 1907, for the NW. $\frac{1}{4}$, Sec. 9, T. 39 N.,

R. 6 E., Seattle, Washington, land district. It seems that the claims of several other persons were at one time asserted to this tract, but as all of such have been disposed of, they need not be further considered.

The material facts necessary to a proper consideration of this matter may be briefly stated as follows:

The township plat was filed in the local office February 6, 1907, and on that day Kate Thompson applied to make homestead entry of the tract above described, alleging settlement prior to the filing of the plat, which application was allowed by the local office February 7. February 6, the same day on which the plat was filed and Thompson presented her homestead application, Fred C. Werner filed a timber and stone application for the same land, which was rejected by the local office because of the prior settlement claim of Kate Thompson. Werner did not appeal, but within the time allowed therefor filed a contest affidavit against Thompson's entry.

It further appears that on April 6, 1907, and within sixty days of the filing of the plat, the State of Washington, in the exercise of the preference right granted by the act of March 3, 1893 (27 Stat., 592), filed school indemnity application No. 01515 for said land, which was rejected May 8, 1907, by the local office, for reason of conflict with Thompson's entry, and from that action the State appealed on June 14, 1907, and filed with said appeal an affidavit of contest against the homestead entry of Thompson.

Upon consideration of the matter as then presented, your office, by decision of October 19, 1908, directed the local office to order a hearing, citing all parties to appear and present testimony in support of their respective claims. The hearing was set for February 25, 1909, on which day the parties to the present controversy appeared, and the question arose between the State of Washington and Werner as to the priority of right to contest Thompson's entry, each of said contestants claiming this priority of right and neither desiring to proceed with the case until that question should be finally determined. Upon motion of Werner's attorney to make the State's contest junior to his, the local officers rendered separate and diverse opinions, the register holding that Werner has the prior right of contest, while the receiver held that the prior right was in the State. The latter appealed from the register's decision and Werner appealed from the receiver's decision; whereupon your office rendered the decision now under consideration, affirming the action of the receiver and holding the prior right of contest to be in the State.

In his appeal from the decision of your office Werner charges, among other things, that it was error not to have held that if the State of Washington has any right of contest at all such right must be exercised within the sixty days allowed the State under the act

of 1893, *supra*, and that it was also error not to have held, as a matter of law, that said act of 1893 gave to the State only a right of selection, which right must be exercised upon land upon which there is no settlement, and that said act does not give to the State of Washington, or any other State, a right of contest against a homestead entry, either within the sixty days allowed for selecting the lands or thereafter.

The State maintains that the right of selection granted it by the act of 1893 was properly asserted within the time allowed by the filing of its selection, and that thereafter, and within the time allowed for appeal, a sufficient affidavit of contest attacking the good faith of the homestead entry was filed, which action, it is urged, was sufficient to protect the State's right so as to defeat any intervening contest.

The act of March 3, 1893, *supra*, provides that the State of Washington, and other States named, shall have—

a preference right over any person or corporation to select lands subject to entry by said States, granted to said States by the act of Congress approved February twenty-two, eighteen hundred and eighty-nine, for a period of sixty days after lands have been surveyed and duly declared to be subject to selection and entry under the general laws of the United States: *And provided further*, That such preference right shall not accrue against *bona fide* homestead or preemption settlers on any of said lands at the date of filing of the plat of survey of any township in any local land office, of said States.

In the circular of May 10, 1893 (16 L. D., 462), which was issued under said act, it is provided that during the period of sixty days no person not claiming in virtue of settlement existing at the date of filing of the plat, will be allowed to enter the lands which are subject to selection by the respective States; that *bona fide* claims of homestead settlers existing at the date of the filing of the plats, being protected by the law, their claims may be made of record during said period of sixty days, in the absence of State selections of record, upon *ex parte* showings of applicants, by affidavit, that they have made *bona fide* settlement prior to the time of the filing of the plat; that—

In the event that a person makes application during such period, for land already selected by the State, alleging settlement thereon existing at the date of the filing of the plat of such township, it will become your duty to order a hearing under practice rules to determine the respective rights of the parties. *James et al. v. Nolan* (5 L. D., 526); *Baxter v. Crilly* (12 L. D., 684). And since the States have a general preference right to select within said period, you will take the same course, in the event they present lists of selections and urge their acceptance as to tracts already covered by actual entries of the alleged settlers.

The States, in such instances, will be required to attack the entries by affidavit of their authorized agents, duly corroborated, denying the existence of *bona fide* settlement on the part of the entrymen prior to the filing of the plat in each case, or alleging that the settlers were not legally qualified to make settlement.

It will thus be seen that the action of the local office in allowing the homestead entry of Kate Thompson was in accord with the regula-

tions obtaining in such matters, and that their action was also proper in rejecting the State's proffered selection. However, it appears that the State appealed from the decision of the register and receiver, and, within the time allowed therefor, filed an appeal accompanied by an affidavit attacking the good faith of the homestead entryman. The question involved therefore is whether or not the State by such action protected the preference right granted it by the act of 1893, as against an affidavit of contest filed against the homestead entry by a third party, prior to the filing of the State's selection, and in this case necessarily prior to the filing of the State's appeal from the decision of the register and receiver.

It seems clear from the law and the regulations issued thereunder, that no rights could be acquired as against the State by the filing of an application under any of the public land laws, except by a homestead or preemption settler who based his claim upon settlement made prior to the filing of the township plat. While such an application might be received and held by the local office to await the action of the State within the period of sixty days allowed by the act of 1893, immediately upon the filing of an application by the State, the prior application of an individual claimant, unless based upon settlement made before the filing of the plat, must yield, as no rights could be based thereon which would be good against the State.

Assuming, therefore, the correctness of the foregoing proposition, the question is presented as to whether any rights may be acquired against the State by the filing of a contest against an alleged invalid settlement claim of record, where the State presents proper application for the land involved during its preference right period of sixty days, and thereafter, and within the time allowed for appeal from the action of the local office rejecting the State's proffered selection, files an affidavit attacking the validity of the settlement claim.

The act of March 3, 1893, *supra*, was clearly intended to give the States named therein the preference right of selection, in satisfying the grants made to the States, for a period of sixty days following the filing of the plats of survey, and the proviso contained in said act was intended to protect only *bona fide* settlers who had located upon the land prior to the filing of the township plats. Inasmuch as the regulations issued by the land department provide that an application, accompanied by an allegation of settlement under the homestead law, prior to the filing of the plat, may be properly allowed and entered of record, it follows that if the contention of the appellant be upheld the right of the State may be defeated by the filing of a fraudulent homestead claim based on alleged prior settlement, followed up by the filing of an affidavit of contest against such entry. That such a course of procedure is clearly opposed to the intent of the act of 1893 can not be denied, and the Department will not so interpret the law and regu-

lations as to permit of that being done by indirection which is positively forbidden to be done directly.

It will be observed that the affidavit of contest filed by Werner charged that the alleged settlement of Kate Thompson was a pretense and a sham; that it was invalid, and that no rights could be acquired thereunder. This affidavit of contest was filed during the sixty-day period following the filing of the plat in the local office; and if the contest of Werner could have been tried and determined within the sixty-day period, and had it resulted in the cancellation of the entry, it necessarily follows that no preference right would have accrued to Werner, because the State could, immediately upon the cancellation of the illegal settlement claim, have selected the land as authorized by the act of 1893.

It is true that while the State in this case presented its selection of the land within the period allowed by the act, it did not file an affidavit attacking the validity of Thompson's settlement until after such period had expired. However, such affidavit of contest was filed by the State during the time allowed for appeal from the action of the register and receiver rejecting the State's selection. It may be said, therefore, that the State, by appeal from the action of the register and receiver and accompanying said appeal by a duly executed affidavit of contest against the settlement claim of Thompson, was urging the acceptance of its selection, and that by such action its rights in the premises were duly protected. The Department is therefore of the opinion that the decision of your office awarding the State the priority of contest was correct and must be affirmed.

RIGHT OF WAY—POWER PURPOSES—ACTS OF MARCH 3, 1891, MAY 11, 1898, AND FEBRUARY 15, 1905.

KERN RIVER COMPANY.

A right of way under the act of March 3, 1891, may be acquired only by a company formed for the purpose of irrigation; but a right of way secured under that act may, under the act of May 11, 1898, be used for purposes of a public nature as subsidiary to the main purpose of irrigation.

A company organized chiefly for the purpose of generating and distributing power is not within the purview of the act of March 3, 1891; and where an application by such a company for right of way under that act has been approved, for lands now within a National Forest, the company may be permitted to relinquish all right under such approval and amend its application to bring it within the act of February 15, 1901, failing to do which, action should be taken by the land department with a view to revocation of the approval.

First Assistant Secretary Pierce to the Commissioner of the General
(O. L.) *Land Office, November 12, 1909.* (S. W. W.)

This case involves the right of way of the Kern River Company for a canal over lands in Independence land district, California, and

within what is now known as the Sequoia National Forest, under the provisions of the act of March 3, 1891 (26 Stat., 1095), based upon the amended application and map approved by the Secretary of the Interior November 27, 1905, and is before the Department upon the company's answer to a rule issued by your office under the Department's instructions of March 21, 1908, requiring said company to show cause why action should not be taken looking to the institution of proceedings to set aside said approval.

The attention of this Department was invited to the case by letter of the Secretary of Agriculture dated March 12, 1908, in which it was stated that the right of way was used by the company solely for power purposes; that many years before the company filed its maps in this Department the entire flow of Kern River, below the company's canal, was appropriated by other parties for irrigation, and that the company was compelled by a permanent court decree to make no permanent diversion of any water from the Kern River, and that the company therefore had no right to the use of the water except for power purposes.

An elaborate answer has been filed in behalf of the company in support of its contention that the application was properly approved, and that there is ample authority in the laws for the use which the company is making of the right of way. It is contended, among other things, that while the act of 1891, *supra*, provides that rights of way through the public lands and reservations of the United States are granted to any canal or ditch company formed for the purpose of irrigation, the act does not anywhere specify the use which may be made of the right of way, and that it is only by remote inference that the act contemplates the use of the right of way for purposes of irrigation. It is also contended to be the well settled rule that a deed or grant cannot be forfeited for use for any purpose not authorized by the deed or grant unless the instrument itself provides for a forfeiture in the event of such use, and that, in all events, a forfeiture is never considered unless the grant by plain and unequivocal language prohibits and directly denies such use and enjoyment for any other purpose than that granted.

The company maintains that inasmuch as the second section of the act of May 11, 1898 (30 Stat., 404), provides that rights of way granted under the provisions of the act of 1891, *supra*, may be used for purposes of a public nature, and as such uses are being made of the right of way involved in that the water conveyed through the canal is used to generate power which is conveyed to the city of Los Angeles for the purpose of lighting the same and operating street cars therein and in the vicinity, such uses are within the meaning of the act of 1898.

It is further contended that all the questions now at issue were considered by the Department before the company's application was ap-

proved, and that the Department in approving the application was informed of the purposes for which the right of way was desired. The company maintains that it is protected in its right of way by virtue of the provisions of section 2339 of the Revised Statutes and the acts of 1891 and 1898 aforesaid; that the government should be as much interested in the generation of electric power whereby public interests are served as in the use of water for irrigation purposes, and it is claimed that as a matter of fact during the year 1907 the company furnished irrigators for operating electric motors for pumping purposes electric power to the extent of 4,032,000 kilowatt hours, and that during four months of the year 1908 the company furnished for such purposes 6,755,000 kilowatt hours.

Section 2339 of the Revised Statutes, upon which the company depends in a measure for the protection of its right, provides:

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

The act of 1891, under which the application was presented, provides:

SEC. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation, and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

SEC. 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of this canal, if the same be upon surveyed lands, and if upon unsurveyed lands within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located, a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office,

and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

SEC. 20. That the provisions of this act shall apply to all canals, ditches, or reservoirs heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior, and with the register of the land office where said land is located, a map of the line of such canal, ditch, or reservoir, as in a case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it: *Provided*, That if any section of said canal or ditch shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited, as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture.

SEC. 21. That nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch.

Section 2 of the act of May 11, 1898, *supra*, provides:

SEC. 2. That the rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature, and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation.

The act of 1898 was passed by Congress because, under the act of 1891 as construed by the Department, all rights of way for the construction of reservoirs, canals, and ditches through the public domain were limited to those the object of which was the furnishing of water for the main purpose of irrigation. Such has been the uniform ruling of this Department from the time the question first appears to have been considered (18 L. D., 573; 20 L. D., 154; 21 L. D., 63), and the fact that Congress passed the act of 1898 is evidence that it, too, recognized the correctness of the interpretation of the previous act of 1891. This is indicated by the plain language of the act of 1898, and also appears from the proceedings had in the House of Representatives at the time the bill was before that body for consideration. Mr. De Vries, who reported the bill to the House

on February 4, 1898, when asked by Dingley to explain the change made in the existing law, replied as follows:

Under the law as it stands at the present time, all rights of way for the construction of reservoirs, canals, and ditches through the public domain, are limited to those the purposes of which are the furnishing of way for irrigation, mining, and reservoir purposes. It does not permit its use for private or domestic purposes, and if it is desired to supply a city from a reservoir or canal across the public domain, such permission is not authorized by the law as it stands at present. It is therefore sought to amend the law by this bill, extending and enlarging the existing privileges, and allowing a license over the public domain for these purposes.

See also House Report No. 279 accompanying the bill, wherein it was stated:

Such a law will accrue to the advantage of supplying a pure water system to many cities and towns in many of the States and Territories, and aid in supplying the same for many other useful purposes.

It is entirely proper in the construction of statutes to consider the whole statute and every material part of the same, and where there are several relating to the same subject all are to be taken together and one part compared with another. Resort may be had to every part of the statute, and where there is more than one *in pari materia*, to the whole system, for the purpose of ascertaining the intent of the legislation. See *Kohlsaat v. Murphy* (96 U. S., 153).

In applying this rule to the case under consideration, it is entirely proper to consider not only the acts of 1891 and 1898, above mentioned, but also the subsequent acts of February 15, 1901 (31 Stat., 790), and February 1, 1905 (33 Stat., 628), both of which provide methods for securing rights of way over lands of the United States for various purposes.

There is no question as to the character of the companies entitled to secure rights of way under the act of 1891, because section 18, which contains the words making the grant, provides only for "any canal or ditch company formed for the purpose of irrigation," and in thus constituting the class of companies entitled to the benefits of the act Congress also indicated the use to be made of the waters stored in the reservoirs and conveyed through the canals and ditches. The position taken by counsel for the company that this is but a remote inference, cannot be sustained. The argument advanced in this connection is utterly fallacious because not only is the inference direct, but in the opinion of the Department it is the only inference deducible from the language employed in the act. If Congress had intended that any public use might be made of the right of way or of the water, it was entirely unnecessary to provide that rights of way could be acquired by canal or ditch companies formed for the purpose of irrigation. It is the duty of this Department to consider, and, if possible, to attach a meaning to every word employed in the

act, and if any meaning at all is to be given the language used by Congress it inevitably follows that the legislative mind had in view only canal and ditch companies formed for the purpose of irrigation, and the use contemplated of the water was the same; otherwise, the language might as well have been omitted.

This being so, prior to the passage of the act of 1898 rights of way under the act of 1891 could be acquired by companies only when they were formed for the purpose of irrigation, and when they intended to use the water for that purpose, and when so acquired by such companies the rights of way could be used only for that purpose. While the act of 1898 extended and enlarged the uses which might be made of the rights of way so acquired, that act made no provision whatever for the recognition of any other class of grantee, but merely specified the additional purposes for which the rights of way might be used. Such has been the uniform holding of this Department as shown by the decisions in 28 L. D., 474; 32 L. D., 461; and 37 L. D., 78.

Not only are the rulings of the land department, which are contemporaneous with the enactment of the statute, entitled to respectful consideration by succeeding officers of the land department, but they are respected also by the courts as shown by the decision of the Supreme Court in the case of *Midway Company v. Eaton* (183 U. S., 602, 609), where the court said:

It is natural to respect the rulings of the land department upon any statute affecting the public domain, and if the rulings were contemporaneous with the enactment of the statute, they afford a somewhat confident presumption of its meaning. One of the reasons is that the officers of the land department may have recommended the statute—indeed, may have written its words, or at any rate were familiar with the circumstances which induced the legislation.

Examining the circumstances under which this act was passed, it will be seen by reference to House Report No. 279, 54th Congress, 2nd Session, that the bill was referred to the General Land Office for report, and the Commissioner recommended certain changes which subsequently became the law.

That the construction placed upon the acts of 1891 and 1898 was the proper one, finds additional support in the laws subsequently enacted by Congress upon the same subject. If the company be correct in its contention, the enactments of February 15, 1901, and February 1, 1905, *supra*, were entirely unnecessary, and this Department will not assume that Congress enacted unnecessary laws, and there is no force in the contention that the subsequent legislation was enacted because of erroneous rulings of the land department. No such intention is indicated by the language employed in the subsequent legislation.

It appears, therefore, that under the act of 1891 a right of way may be acquired by a company only when it is formed for the purpose of irrigation, and that such a company having acquired a right

of way may use the same for the purposes specified in the act of 1898. From the showing made by the company in this case, it appears that the main purpose for which the right of way is used is the generation of electric power. Congress by the act of February 15, 1901, enacted a law providing a means whereby a company may acquire a right of way for those purposes. Rights of way, however, acquired under this act are not grants but merely licenses or permits subject to revocation by the Secretary of the Interior. If, as contended by the company, the right to acquire a right of way was granted by the act of 1891 for the purpose of generating electric power, it would seem to follow that the act of 1901 was intended to revise the former law, and in that event it would operate to displace such previous law, and that, therefore, subsequent to the passage of the act of 1901 no right of way for the purpose of generating power could be acquired except under the provisions of that act.

The decision of the Supreme Court in the case of *Gutierrez v. Albuquerque Land & Irrigation Co.* (188 U. S., 545), is not controlling of this case, because the company involved therein, so far as is shown, was formed for the purpose of conveying water to be used for irrigation.

It appears that this company originally applied for a right of way in 1897. This application was approved by the Secretary of the Interior April 14, 1899. In the certificate endorsed upon the map by the company's president it was stated that the right of way was desired in order that the company might obtain the benefits of sections 18 to 21, inclusive, of the act of March 3, 1891, *supra*, and section 2 of the act of May 11, 1898, and that the right of way sought was desired "solely for the purposes prescribed by the aforesaid act."

In 1904, the company presented an amended application which, as has been heretofore stated, was approved by the Department November 27, 1905. In the certificate endorsed by the company's president on the amended application it was stated that the benefits of sections 18 to 21, inclusive, of the act of 1891 were desired, and that the right of way was desired for public purposes.

Accompanying the answer submitted by the company to the rule to show cause there was filed an agreement entered into between Miller & Lux, a corporation, and others, and the Kern River Company, under date of December 23, 1904, by the 11th article of which it appears the Kern River Company agreed that all of the water of Kern River diverted by it into its canal should be used by the company solely for the purpose of generating power, with the exception of not exceeding two cubic feet per second, which amount was reserved for a special purpose mentioned in the agreement. Therefore, whatever may have been the intention of the company at the time of securing the original approval, it is clear that at the time of the

approval of the amended application the company had bound itself not to use the right of way for the purpose of irrigation, but had solemnly agreed to use the water only for the purpose of generating power. It is not mentioned by the company that the Department was informed of this agreement at the time of the approval of the amended application, which application was approved in consideration of the company's relinquishment of that formerly approved. Be that as it may, however, if the company was prevented by its own act from engaging in the business of irrigation, and was limited to generating power, it follows that it was not entitled to an approval under the act of March 3, 1891, and whether the Department was informed of the circumstances or not is wholly immaterial; because the United States Government is not bound by the unauthorized acts of its officers or agents, and the Secretary of the Interior had no authority to approve an application for a right of way under the act of 1891 where the company was not formed for the purpose of irrigation, or where, if the company had originally intended to engage in the business of irrigation, it had by its own act put it beyond its power to engage in such business.

The law found in the Revised Statutes under section 2339 constitutes merely a recognition by the United States of water rights acquired under usage, customs, and the laws of the State, and in addition thereto recognizes the rights of persons acquiring such rights to go across the public lands. It is too obvious for argument that in 1866, the date of the original act constituting this law, Congress did not contemplate power companies because they were not in existence at that time. The purpose of the act of 1866 was thoroughly considered by the Supreme Court of the United States in the case of *Jennison v. Kirk* (98 U. S., 453), reference to which will show that Congress merely intended to recognize rights acquired in the manner above stated. Moreover, section 2339 of the Revised Statutes does not authorize the construction of a right of way across reservations of the United States, but seems to be limited to the public lands, and at the time of the approval of the application under consideration the land was within a forest reserve.

Respecting the company's contention that a deed or grant cannot be forfeited for use for any purpose not authorized by the deed or grant unless the instrument itself provides for a forfeiture, it may be said that the same contention was made in the case of *United States v. Minor* (114 U. S., 233), but was not sustained by the courts. See also the case of *Mullan* and another against the United States (118 U. S., 271), where the court held that relief would be afforded the United States in equity to recover title to lands certified to the State as school indemnity under a mistaken view of the law by the Secretary of the Interior.

In view of the foregoing, the Department is of the opinion that the company was not entitled to an approval of the application under consideration, and that action should be taken looking to its revocation. There seems to be no doubt, however, that the company is entitled to a permit under the act of 1901, *supra*, under such regulations as may be imposed by the Department of Agriculture. The case is therefore remanded with instructions that the company be advised that it may within a given time amend its application so as to bring it within the last-mentioned act, provided the same be accompanied by a proper relinquishment of all right and interest under the approval heretofore erroneously given under the act of 1891. In the event the company fails or refuses to avail itself of this privilege within a reasonable time to be fixed by your office, you will prepare the necessary papers for presenting the matter to the Department of Justice with a recommendation for the institution of proper proceedings to set aside the approval heretofore given.

PUBLIC LAND—AGGREGATE AREA UNDER PUBLIC LAND LAWS—ACT
OF AUGUST 30, 1890.

TRENTHAM *v.* COPENHAVER.

The area embraced within a homestead entry relinquished prior to the acquisition of title does not come within the provision of the act of August 30, 1890, limiting the amount of land that may be acquired by any one person under the public land laws to 320 acres.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, November 13, 1909.* (J. F. T.)

Mack Trentham has appealed to the Department from your decision of November 3, 1908, sustaining the action of the local officers of February 24, 1908, and rejecting his contest affidavit against desert-land entry number 4176, made by Denton D. Copenhaver October 25, 1907, for the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 24, T. 16 S., R. 12 E., NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 19, T. 16 S., and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 18, T. 16 S., R. 13 E., S. B. M., containing 320 acres, Los Angeles, California, land district.

The contest affidavit was filed February 7, 1908, alleging:

That said Denton D. Copenhaver had made homestead entry No. 10648 for NW. $\frac{1}{4}$, Sec. 24, T. 16 S., R. 15 E., S. B. M., on September 1, 1904, and had relinquished the same for a valuable consideration. He had thereby exhausted his right to enter more than 160 acres under the public land laws and his said entry of desert land entry No. 4176 is illegal.

It is held in the case of *Stuart v. Burke* (32 L. D., 646), that the—limitation in the act of August 30, 1890 (26 Stat., 391), as to the amount of land that may be acquired by any one person under the public land laws, applies only to acquisition of title and not the amount of land that may be entered or filed upon under such laws.

And it is held in the case of Mabelle Meserve (33 L. D., 580) that—a right initiated but not consummated under the desert-land act does not under the limitation as to acreage contained in the act of August 30, 1890, exhaust the right of the entryman under the public land laws; and if such entry be subsequently relinquished, it constitutes no bar to the exercise of the right granted by the homestead law.

No reason is perceived why the reverse of this proposition would not be equally true. If Copenhagen's former entry had been made under the desert-land laws, the rules laid down in departmental decision of November 1, 1909, in the case of Alfred D. Hull *v.* Helena B. Oakley *et al.* would apply, but as it was a homestead entry and he did not acquire title to any land thereby, it is clear that he may still exercise his right to make entry for 320 acres under the desert-land act.

Your decision is accordingly affirmed.

INFORMATION FROM FISCAL RECORDS OF FIELD OFFICERS OF RECLAMATION SERVICE.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., November 15, 1909.

FIELD OFFICERS,

Reclamation Service:

Any water-users association or any individual having an interest in the lands included in a reclamation project desiring information from the fiscal records of a field or local office of the Reclamation Bureau, may proceed in the following manner:

1. Application must be made in writing to the supervising engineer of the district, stating the interest applicant has in the project, the nature of the information desired, and the use proposed to be made thereof.

2. The supervising engineer, if satisfied that the giving of such information will not be detrimental to the public service, will endorse on such application his approval, whereupon the information sought will be promptly supplied and a record made thereof. If the application be denied, the supervising engineer will endorse the reasons for disallowance thereupon and promptly forward the same to the Secretary of the Interior.

R. A. BALLINGER, *Secretary.*

H. H. YARD ET AL.

Motion for review of departmental decision of August 27, 1909, 38 L. D., 59, denied by First Assistant Secretary Pierce November 19, 1909.

JOHN F. BUTLER.

Motion for review of departmental decision of August 27, 1909, 38 L. D., 172, denied by First Assistant Secretary Pierce November 19, 1909.

ALLEN ET AL. *v.* DENVER POWER AND IRRIGATION CO.

Motion for review of departmental decision of September 20, 1909, 38 L. D., 207, denied by First Assistant Secretary Pierce November 19, 1909.

FEES—CERTIFIED COPIES OF RECORDS—REGISTERS AND RECEIVERS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 22, 1909.

REGISTERS AND RECEIVERS

AND UNITED STATES SURVEYORS-GENERAL.

SIRS: The regulations contained in the circulars to Surveyors-General of April 15, 1907 (35 L. D., 514), October 19, 1907 (36 L. D., 125), and February 21, 1908 (36 L. D., 282), as far as they prohibit the acceptance of personal fees for copies of records and require the preparation of such copies during office hours, are hereby extended to the offices of Registers and Receivers, and you are advised that hereafter the performance of any service by you or by the employes of your offices for which personal remuneration or compensation is received is hereby prohibited, except as to cases where an officer or employe receives fees or compensation expressly allowed by law. Nor shall such service be performed save in the course of official duties and during office hours, and persons not officially connected with any office, even though Government employes, shall not be admitted to that office outside of office hours, unless the public interests are involved in the purpose for which such admission is desired or requested, in which event you are authorized to extend the working hours for such purpose.

When certified copies of records are requested and the pressure of public business will not permit of the work being done by the office force, the parties desiring same, if desk room is available, may be permitted to make such copies, but before certification by you copies thus made must be carefully compared by your office force and you will charge therefor the fees allowed by law.

All moneys received for copies of records must be deposited by Surveyors-General to the credit of the Treasurer of the United States, as directed in the circulars above cited, and all moneys so received

by Receivers of Public Moneys must be deposited to the credit of the Treasurer of the United States on account of "Fees and Commissions." Such moneys cannot be made available for expenditures of any character.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

R. A. BALLINGER, *Secretary.*

SIoux INDIAN LANDS—PRICE OF LAND—REPAYMENT.

ROY H. REID.

The inadvertent inclusion of a tract of Sioux Indian lands in a homestead entry, at a time when the land was rated at 75 cents per acre, which entry was subsequently amended to describe in lieu of the tract entered the tract actually settled upon and intended to be taken, does not have the effect to fix the price of the erroneously-entered tract at 75 cents, the status thereof remaining the same with respect to price as though the erroneous entry had never been made; and where a subsequent entryman was required to pay 75 cents per acre therefor, after the price of all undisposed-of Sioux lands had been reduced to 50 cents, under the belief that the price had been fixed by such previous entry, he is entitled to repayment of the excess.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, November 23, 1909.* (J. F. T.)

October 19, 1903, Roy H. Reid made homestead entry number 5354 for lots 3 and 4 and E. $\frac{1}{2}$ SW. $\frac{1}{4}$ (fr. SW. $\frac{1}{4}$), Sec. 31, T. 106 N., R. 75 W., 5th P. M. (159.10 acres), Chamberlain, South Dakota, land district, for which, on making commuted homestead entry number 1632, July 9, 1906, he was required to pay 75 cents per acre, although the price of all undisposed-of Sioux lands had been reduced to 50 cents per acre on February 10, 1895.

December 17, 1908, application was filed for the return of alleged excess payment of 25 cents per acre. By your decision of June 30, 1909, this application for repayment was denied, and Reid has appealed to the Department.

Your action in denying said repayment was based upon the fact that the tract in question was through mistake included in homestead entry number 2260, made October 9, 1893, by Nels Nelson, which said entry of Nelson, by authority of your office letter "C" of May 15, 1894, was amended to embrace the SW. $\frac{1}{4}$, Sec. 32, T. 106 N., R. 75 W., 5th P. M., same land district, the last-described tract being that which Nelson supposed he was making entry for and the tract upon which he actually settled. This amendment left said SW. $\frac{1}{4}$, Sec. 31, vacant and subject to appropriation by the first qualified

applicant, and it is noticed that it was not entered for over ten years thereafter, indicating that it was not of that class for which the higher price was exacted or willingly paid because of the superior character of the lands.

The repayment of 25 cents per acre in this case is based upon the proposition that the erroneous description of land appearing in the entry of said Nels Nelson was not such an entry of the land as fixed the price of the tract in question at 75 cents per acre. The right to repayment of 25 cents per acre in this case rests upon the construction given the words "disposed of" and "actual settlers only" in Sec. 21, act of March 2, 1889 (25 Stat., 888). It can not be held that the erroneous inclusion or description of the tract first mentioned in Nels Nelson's entry was a disposal of the same to an actual settler fixing the price thereof at 75 cents per acre under the rule laid down in the case of *D. B. Bowersox* (38 L. D., 213). Nelson did not make a new entry. The record and the papers were only corrected so as to describe the land he viewed and upon which he made an actual settlement, the number and date of the entry remaining the same, which shows that on October 9, 1893, he entered the SW. $\frac{1}{4}$, Sec. 32, and that he did not enter the SW. $\frac{1}{4}$, Sec. 31, or any part thereof. Otherwise, it must be held that two tracts of 160 acres each could be disposed of on an application for 160 acres.

It follows, therefore, that Nelson's amended entry was the only entry he made, and that the land embraced therein was the only land the price of which was thereby fixed at 75 cents per acre; the land first erroneously described in his entry, being the land afterward entered by Reid, remaining as though nothing had been done in connection therewith; and for these reasons your decision is reversed, and if no other sufficient objection appears, the repayment claim will be allowed.

BALLANTYNE v. HARMON.

Petition to set aside departmental decision of October 10, 1908, 37 L. D., 188; denied by First Assistant Secretary Pierce November 26, 1909.

**RECLAMATION WITHDRAWAL-PROTEST-PAR. 6, REGULATIONS
JANUARY 19, 1909.**

NEW CASTLE COMPANY v. ZANGANELLA.

Paragraph 6 of the regulations of January 19, 1909, to the effect that the prosecution of contests affecting lands included within a first-form withdrawal under the reclamation act, out of which preferred rights of entry might arise, should not be allowed, has no application to a protest by one claiming under a placer location against a conflicting desert-land entry, no question of preference right of entry being involved in such proceeding.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, November 26, 1909.* (F. H. B.)

From the record in this case it appears that on June 15, 1907, Peter Zanganella made desert entry (No. 784 Ute) for the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 30, T. 5 S., R. 90 W., Glenwood Springs, Colorado, land district.

February 18, 1908, The New Castle Portland Cement Company filed its protest against the entry, in which, as far as is material here, it alleged a prior location, under the mining laws, of the H. V. K. Part placer mining claim, containing 120 acres and embracing the subdivision above described, and that the land in question "is essentially mineral land, having thereon large beds of shale in place which when properly treated is convertible into a high grade of Portland cement."

Pursuant thereto a hearing was duly ordered and had, April 13, 1908, at which appearance was made and evidence adduced on behalf of the parties.

Thereafter, on November 2, 1908, the local officers, upon a review of the evidence so submitted, found that the allegations of the protest had been sustained.

Upon appeal by the entryman, your office, by decision of May 17, 1909, after a brief statement of the case and the proceedings theretofore had therein, held as follows:

The section has been classified as coal land, minimum price, and was withdrawn, first form, December 3, 1908, under act of June 17, 1902, for the Grand Valley project.

In view of the withdrawal, the contest proceedings are vacated, under paragraph 6 of regulations, concerning lands withdrawn under said act, as amended January 19, 1909 (37 L. D., 365).

Both parties have appealed to the Department. The entryman expressly disclaims any desire that the above action be reversed, but invokes a definition of the status of his entry in consequence of the coal classification and the withdrawal in contemplation of the reclamation project. The protestant company, on the other hand, insists that the controversy hitherto pending between it and the entryman should be decided on the merits, contending that in the event of a favorable decision and the ultimate revocation of the withdrawal it would be in position to consummate entry under the placer mining law.

Just what weight was intended by your office to attach in the present case to the coal classification of the land, remarked in the above excerpt from the decision, does not clearly appear, as the order vacating the proceedings theretofore had upon the protest is made "in view of the withdrawal" and "under paragraph 6 of regulations," governing such withdrawals, as amended January 19, 1909.

The primary question, therefore, is with respect to the application of the cited paragraph, which is as follows:

No contest will be allowed against any entry embracing land included within the area of any first form withdrawal, and in all cases where a contest has been allowed prior to such withdrawal, the withdrawal, if made before the termination of the contest, or before entry by the successful contestant, will, *ipso facto*, terminate all right that was acquired by reason of such contest.

This superseded the like-numbered paragraph of the regulations approved June 6, 1905 (33 L. D., 607), which, together with the original seventh paragraph, read as follows:

Sixth. Any entry embracing lands included within any withdrawal, made under either of the forms mentioned, whether such entry was made before or after the date of such withdrawal, may be contested and canceled because of entryman's failure to comply with the law or for any other sufficient reason, and any contestant who secures the cancellation of such entry and pays the land office fees occasioned by his contest will be awarded a preferred right of making entry under the reclamation act, provided the lands involved are not embraced within a withdrawal of the first form.

Seventh. When any entry for lands embraced within a withdrawal under the first form is canceled by reason of contest, or for any other reason, such lands become subject immediately to such withdrawal and can not, thereafter, so long as they remain so withdrawn, be entered or otherwise appropriated, either by a successful contestant or any other person; but any contestant who gains a preferred right to enter any such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry.

It will be observed that the original sixth paragraph, above, which expressly authorized a contest against an entry whether made before or after either form of withdrawal under the reclamation act, as supplemented by the then seventh paragraph also contemplated a preferential right of entry in the successful contestant as to land embraced in a first form withdrawal as well, which should be held in abeyance indefinitely and pending a future revocation of the withdrawal, but which should thereupon be lawfully subject to exercise. The impolicy of thus anticipating conditions which for indeterminate periods of time should control the disposition of such lands became eventually manifest. The matter presented itself and was considered in the case of *Fairchild v. Eby* (37 L. D., 362), in the disposition of which the Department, besides directing the amendment of paragraphs 6 and 7, said in part:

A regulation that contemplates the acquisition of legal rights that must be suspended indefinitely can only result in great confusion in the disposal of the public lands, and ought not to have been made and should not be continued. Such is the apparent result of the right conferred by the sixth and seventh regulations of June 6, 1905, and it is believed that the interest of the government, as well as the general public, will be subserved by their revocation.

Leaving out of view the objection which the protestant company now urges against a retroactive application of the amendment to the

controversy between the parties in this case, it is in any event clear that the object and purpose of the amendment were to disallow the prosecution of those contests, affecting lands included within a first form of withdrawal under the reclamation act, out of which preferred rights of entry arise as by law provided. The protestant here, relying upon a placer mining location and the mineral character of the land involved, would neither have nor need such a right, and the considerations upon which the former paragraphs were so amended would not obtain. A decision, favorable to the protestant, of the issue between it and the entryman would dispose of the desert entry, but would confer upon the protestant no other benefit (apart from an affirmative mineral adjudication) than to leave its claim to be dealt with as though no desert entry had been made. So, too, on the other hand, a decision in favor of the entryman would eliminate the mining location from the case, in like manner and to the like end.

For present purposes it is immaterial whether or not the land in controversy will be required for the purpose contemplated by the withdrawal, and whether the withdrawal is to become permanent or ultimately to be revoked. In either event, the case should seasonably be cleared of one of these antagonistic claims, leaving the other for such appropriate consideration and disposition as the outcome of the further features disclosed by the record may necessitate. Assuming, in this connection, a future revocation of the withdrawal, the party prevailing in the present controversy would have the right to challenge the coal classification and try the question, in accordance with the appropriate provisions of the regulations approved September 7, 1909 (38 L. D., 181 and 183).

The decision of your office is reversed, and the case is remanded for readjudication upon the issue raised by the protest and in accordance with the evidence submitted in that behalf.

HOMESTEAD CONTEST—ABANDONMENT—MILITARY SERVICE—ACT OF JUNE 16, 1898.

BIESANZ *v.* JACOBSON.

In a contest against a homestead entry on the ground of abandonment it is not necessary, under the act of June 16, 1898, to either allege or prove that the entryman's absence was not due to military service, where the United States was not engaged in war during the period of abandonment charged.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, November 26, 1909.* (G. C. R.)

This case involves homestead entry No. 12,085, made March 19, 1902, by John C. Jacobson, for the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 7, and SW. $\frac{1}{4}$

NW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 8, T. 3 N., R. 10 E., Vancouver, Washington.

The case is here on appeal by said entryman from your office decision of August 23, 1909, ordering another hearing on the contest of William A. Biesanz, filed June 15, 1906, alleging in substance abandonment and actual residence away from the land for the six months next preceding contest filing.

Your office decision reversed the action of the register and receiver dismissing plaintiff's appeal and denying his motion to reinstate the contest.

It appears that upon notice duly served, testimony was taken before a United States commissioner July 26, 1906, final hearing to be had before the register and receiver August 3, of that year.

Defendant was present when said testimony was taken and cross-examined plaintiff's witnesses. Plaintiff at the conclusion of his testimony rested; defendant offered no testimony.

Prior thereto and on July 20, 1906, defendant filed in the local office a motion, copy of which was served by registered letter on the attorney for plaintiff, to dismiss the contest filed June 15, 1906, on the ground that a trial had already been had under a former contest between same parties, upon the issues involved in this contest and that the issues were therefore *res judicata*.

This motion was denied by the register and receiver February 6, 1908. There are no papers in the record transmitted here showing that any contest had been filed against the entry prior to June 15, 1906.

Admitting, however, that such a prior contest had been filed, defendant's appearing at and participating in the alleged second contest was an acquiescence on his part that the issues might again be tried.

As observed, final hearing was fixed before the register and receiver August 3, 1906.

Defendant then and there appeared but plaintiff did not appear, electing to stand on the testimony introduced by him before the United States commissioner July 26, 1906, when he rested his case.

Had defendant, as was his right, introduced testimony before the commissioner to controvert that which was given against him, plaintiff, as contestant, etc., would have been required to pay the costs of same.

No reason was assigned for defendant's failure to submit testimony before the commissioner and, from all that appears in the record, plaintiff was justified in believing that defendant did not intend to introduce testimony.

Under these circumstances, plaintiff was not required to appear before the register and receiver on the date of final hearing, August 3, 1906.

The sole question before the register and receiver was whether the testimony offered by plaintiff before the commissioner made up a *prima facie* case of the alleged abandonment.

Your office, in the decision appealed from, held that such a case was made out.

The testimony has been examined. The same tends to show that the entryman never in fact was a *bona fide* resident on the land but that he lived, with his family, in Portland, Oregon, and was during the lifetime of his entry a clerk in a store in that city.

If claimant has any defense to make against the damaging testimony offered against him, it would seem that he should desire and not oppose an opportunity to offer it.

The appeal contends that the contest should be dismissed for its failure to allege that abandonment was not due to the military service, etc.

Such an allegation was not necessary in the contest affidavit, nor was it necessary to prove nonmilitary service, etc., at the hearing. The act making such requirement was passed June 16, 1898 (30 Stat., 473), during the then-existing war with Spain. The provision is only applicable to the period in which the United States is engaged in some war. The period of the alleged abandonment was in 1906, when there was no war in which the United States was engaged; hence it was not necessary to allege or prove nonmilitary service, etc. See unreported case of Oscar B. McCabe *v.* James S. Brant, January 11, 1908.

Finding no sufficient ground for disturbing the action appealed from, the same must be and it is hereby affirmed.

BITTER ROOT LANDS—PRICE—REPAYMENT.

WALTER HOLLENSTEINER.

Notwithstanding the act of June 5, 1872, opening the lands in the Bitter Root Valley above Lo-Lo Fork to settlement, fixed the price thereof at \$1.25 per acre, the even-numbered sections falling within the primary limits of the grant to the Northern Pacific Railroad Company were, under section 2357 of the Revised Statutes, properly rated at \$2.50 per acre; and an entryman required to pay the higher price is not entitled to repayment of the difference.

The fact that entries for lands required by law to be disposed of at double-minimum may have been erroneously permitted to be carried to completion upon payment of the single-minimum price, will not justify the allowance of further entries for such lands at the minimum rate.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, November 27, 1909.* (C. J. G.)

An appeal has been filed by Walter Hollensteiner from the decision of your office of June 16, 1909, denying his application under section 2 of the act of March 26, 1908 (35 Stat., 48), for repayment of excess purchase money alleged to have been paid by him on commuted homestead entry for the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, lots 3 and 4, Sec. 4, T. 11 N., R. 20, containing 144.62 acres, Missoula, Montana. Said section provides:

That in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives.

The original entry of Hollensteiner was made November 21, 1891, and the commuted entry February 17, 1893, at which time he paid the sum of \$361.56, being at the rate of two dollars and fifty cents per acre. It is claimed that one dollar and twenty-five cents per acre was the proper price of the land, and that the amount paid over that price was in excess of legal requirements.

This tract is part of the lands situated in the Bitter Root Valley mentioned in the treaty of cession made with the Flathead Indians, July 16, 1855, and ratified by the Senate March 8, 1859 (12 Stat., 975). By the second article of the treaty there was set apart and reserved from the lands ceded a general reservation for the Indians, known as the Jocko Reservation. Article 11 provided that the Bitter Root Valley above the Lo-Lo Fork of the Bitter Root River should be carefully surveyed and examined, and if it should prove, in the judgment of the President, to be better adapted to the wants of the Flathead tribes than said general reservation, then such portions of it as might be necessary should be set apart as a separate reservation of the tribe. But no portion of the Bitter Root Valley, above the Lo-Lo Fork, was to be opened to settlement until such examination was had and the decision of the President made known.

November 14, 1871, the President issued proclamation, which recited that the Bitter Root Valley, above the Lo-Lo Fork, having been carefully surveyed and examined—

has proved, in the judgment of the President, not to be better adapted to the wants of the Flathead tribe than the general reservation provided for in said treaty. It is therefore deemed unnecessary to set apart any portion of said Bitter Root Valley as a separate reservation for the Indians referred to in said treaty. It is therefore ordered and directed that all Indians residing in said Bitter Root Valley be removed as soon as practicable to the reservation provided for in the second article of said treaty. . . . It is further ordered that after the removal herein directed shall be made, the Bitter Root Valley aforesaid shall be opened to settlement.

This tract is also within the primary limits of the grant made by the act of July 2, 1864 (13 Stat., 365, 367), to the Northern Pacific Railroad Company, as shown by maps of general route filed January 21, 1872, and of definite location filed July 6, 1882. The grant was a present one (1 L. D., 368), and conveyed lands within the granted limits, to which the United States had—

full title, not reserved, sold, granted, or otherwise appropriated . . . at the time the line of road is definitely fixed, and a plat thereof filed; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, etc., other lands shall be selected by said company in lieu thereof.

Section 6 of the act provided that:

The reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre, when offered for sale.

The act of June 5, 1872 (17 Stat., 226), provided in section 1 for the removal of the Flathead and other Indians from the Bitter Root Valley to the Jocko Reservation, and section 2 declared that lands in said valley, lying above the Lo-Lo Fork, should be surveyed as soon as practicable "as other public lands of the United States are surveyed;" and that—

said lands shall be opened to settlement, and shall be sold in legal subdivisions to actual settlers only . . . in quantities not exceeding one hundred and sixty acres to each settler, at the price of one dollar and twenty-five cents per acre, payments to be made in cash within twenty-one months from the date of settlement or the passage of this act.

The act further provided for the reservation of the sixteenth and thirty-sixth sections for school purposes and of lands for townsites. No more than fifteen townships of the lands so surveyed were to be subject to the provisions of the act. None of the lands in said valley above the Lo-Lo Fork were to be opened to settlement under the homestead and pre-emption laws, and out of the first moneys arising from the sales the sum of \$50,000 was to be reserved and set apart for the use of the Flathead Indians. This act had the effect of abrogating and superseding the President's order of November 14, 1871, in so far as said order declared the lands in the Bitter Root Valley, above the Lo-Lo Fork, opened to settlement (25 L. D., 266). The tract in question appears to be within one of the fifteen townships in the Bitter Root Valley, above the Lo-Lo Fork of the Bitter Root River, as shown by the map or diagram of said valley approved by the Department April 14, 1894 (12 L. D., 49; 19 L. D., 532; 20 L. D., 90). This map or diagram, defining the limits of the Indian Reservation of 1855 in the Bitter Root Valley, above the Lo-Lo Fork, has been recognized and followed in determining the extent of said

reservation as against the subsequent grant to the Northern Pacific Railroad Company (28 L. D., 305).

The act of February 11, 1874 (18 Stat., 15), extended the time of sale and payment of preempted lands in the Bitter Root Valley, and also extended the benefit of the homestead act to all settlers on lands within said valley. This act did not repeal the general provisions for the disposition of lands within the fifteen townships made by the act of June 5, 1872 (25 L. D., 266).

The lands in the Bitter Root Valley, above the Lo-Lo Fork of the Bitter Root River, the same having been reserved for the Flathead and other Indians under the treaty of July 16, 1855, were excepted from the operation of the grant to the Northern Pacific Railroad Company (1 L. D., 368; 19 L. D., 532; 20 L. D., 90; 25 L. D., 266; 28 L. D., 306; 61 Fed. Rep., 554).

In support of the application for repayment, it is claimed that as the price of the land embraced in Hollensteiner's entry was fixed by the act of June 5, 1872, at one dollar and twenty-five cents per acre, and as there has been no repeal of said act, either expressly or by necessary implication, Hollensteiner was erroneously required to pay more than said amount; that as none of the lands in the Bitter Root Valley passed under the grant to the Northern Pacific Railroad Company, the fact of this land being within the limits of said grant did not have the effect to raise the price to two dollars and fifty cents per acre, and that therefore the excess over one dollar and twenty-five cents per acre was illegal payment and should be repaid under the provisions of the act of March 26, 1908. The decision of your office, after adverting to the fact that the lands within the fifteen townships are held to have been excepted from the operation of the Northern Pacific grant, concluded:

Notwithstanding this exception, the railroad company acquired new lands for those lost in the Flathead Indian Reservation, having earned the same through the construction of the road. As the settlers within the before-mentioned limits have had the benefit of the constructed road, to aid in which the Government has donated the area of public lands recited in the grant, it appears that the price paid by the applicant, two dollars and fifty cents per acre, is that required by section 2357, Revised Statutes.

The proviso to section 2357 of the Revised Statutes is as follows:

That the price to be paid for alternate reserved lands, along the line of railroads within the limits granted by any act of Congress, shall be two dollars and fifty cents per acre.

The briefs filed in support of the appeal herein are almost wholly directed to the contention that this proviso has no application to Bitter Root Valley lands, for the reason that said lands are not "alternate reserved lands," along the line and "within the limits granted" to the Northern Pacific Railroad Company. It is also

claimed that lands in the same section as that of Hollensteiner's, have been sold under the provisions of the act of June 5, 1872, at one dollar and twenty-five cents per acre. This is entirely possible, as, under the circumstances, these lands being within an Indian Reservation, and authorized by the act of 1872 to be sold at one dollar and twenty-five cents per acre, and being also within the limits of a railroad grant to which the proviso to section 2357 of the Revised Statutes, as well as the price requirement of the granting act itself, would ordinarily apply, some confusion as to the proper price to be charged therefor was to be expected. But the fact that some persons may have been charged at one rate and some at another for said lands is not material for the purpose of this case and can not affect the determination as to whether the proper price was in fact paid by Hollensteiner.

It appears that applications similar to the present one for repayment of double minimum excess, alleged to have been paid on entries of lands in the Bitter Root Valley, have heretofore been filed and passed upon by the Department. These applications were made under the act of June 16, 1880 (21 Stat., 287), which provided that:

In all cases where parties have paid double minimum price for land which has afterwards been found not to be within the limits of a railroad grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns.

The applications were invariably denied, because either the lands were found not to be a part of the fifteen townships, or because although being within said townships and therefore authorized by the act of June 5, 1872, to be sold at one dollar and twenty-five cents per acre, said lands were not such as were afterwards "found not to be within the limits of a railroad grant." This latter was on the theory that the lands in the Bitter Root Valley, although excluded from the grant to the railroad company because of their character as an Indian Reservation, are nevertheless within the granted limits. (See cases of William P. Maclay, 2 L. D., 675, and Shelton McClain, 28 L. D., 456.) It is proper to say here that under the repayment act of March 26, 1908, which is supplemental to the act of June 16, 1880, authority now exists for repayment in all cases where it satisfactorily appears that a person has been required to pay under the public land laws in excess of the amount he was lawfully required to pay.

The contention made as to why the price rule laid down in section 2357 of the Revised Statutes and in the granting act of the Northern Pacific Railroad Company does not apply to the lands in the Bitter Root Valley—namely, that said lands being within an Indian Reservation, there was no grant, and, hence, no "alternate reserved lands"—is, upon analysis, more technical than sound. The true

explanation for charging more for lands within railroad limits is because of the supposed increase in value of such lands by reason of their proximity to a definitely-located or constructed line of railroad. This reason applies equally whether the particular lands actually passed under the grant to the railroad or not; their value is enhanced just the same. As was said in the case of *United States v. Ingram* (172 U. S., 327, 329):

The reason for this addition to the price of alternate reserved sections within a railroad grant has been often stated by this court, and is referred to in the opinion in *United States v. Healey, supra*. It is that a railroad ordinarily enhances the value of contiguous lands, and when Congress granted only odd sections to aid in the construction of one it believed that such construction would make the even and reserved sections of at least double value.

This difference in price was based, as will be perceived, solely on the matter of location, and not at all upon any distinction in the character or quality of the land, and the difference in price was the only matter that distinguished between an entry of lands within and those without the place limits of a railroad.

It was found in the *Maclay* case, *supra*, that the land involved therein was not a part of the fifteen townships, but it was nevertheless held that although the odd sections in the Bitter Root Valley did not pass to the Northern Pacific Railroad Company under its grant, yet the fact that the odd as well as the even sections were reserved, all being within the geographical limits of the grant, ought not affect the price of the even sections; that the fact of the nearness of the road to the even sections is what enhanced their value, and not the fact that the company owned the odd sections.

The act of June 5, 1872, in fixing the price of fifteen townships in the Bitter Root Valley, had sole reference to the sale of said townships for the benefit of the Indians. The element of a railroad grant and its effect upon the lands did not enter into the calculation. The conditions in connection with such grant arose subsequently, upon the definite location of the road. It is not sufficient to say that Congress in the act of 1872 was aware of the grant to the Northern Pacific Railroad Company. At that time the line of road was not definitely fixed. As was said in the case of *William P. Maclay, supra*:

It not unfrequently happens that the granted limits as fixed by the map of general route are changed by filing the map of definite locations, and lands included in the first limits are left outside of the grant as definitely fixed.

The general rule is that lands, although not passing under a railroad grant, but within its limits, are raised to the double minimum price (3 L. D., 158, 477). It is not thought that because in the act of 1872 the price of the lands in the Bitter Root Valley, above the Lo-Lo Fork, was placed at one dollar and twenty-five cents per acre, makes any distinction, as the future conditions in respect to said lands could not have been anticipated in legislation. In 1884 a question was

raised in regard to the grant to the Northern Pacific Railroad Company, the lands involved being those released from the reservation made for the benefit of the Crow Indians. The reservation was held to be sufficient to except the odd sections from the operation of the grant to said company, and it was alleged because of this fact the even sections within the limits of the grant, and also the reservation, were not subject to increase in price. In considering the matter, it was said in the case of *Clark v. Northern Pacific Railroad Company* (3 L. D., 158) :

The even sections along said line are fixed by law at \$2.50 per acre, being alternate reserved sections along the line of a land grant road, and your ruling to the effect that, where the odd sections by reason of being in a state of reservation at date of definite location are excepted out of the grant, such exception operates to destroy the alternation of the even sections and thus preserves the single minimum price at \$1.25 per acre is error. The grant is of quantity to be taken in place where the lands are in condition to pass by the grant at definite location, with indemnity for the alternate odd sections exceptionally taken out of the grant by sale, reservation, pre-emption claim, or otherwise. It may be that a single quarter section is thus excepted; it may be a whole section; it may be several sections; and it may be a large tract: but the principle is precisely the same. It is in each particular case an alternate odd section that, but for the exceptional condition as expressed in the grant, would pass.

So the alternation of the even sections depending upon the same conditions is alike preserved, and the legal price is \$2.50 per acre as fixed by law.

So, also, in the case of *Daniel Campbell* (22 L. D., 673) it was held that odd-numbered sections within the primary limits of a railroad grant, but excepted from the operation thereof, must be held at double minimum where such grant requires the alternate reserved sections to be sold at said price. In that case it was said:

It is alleged by Mr. Campbell that other persons entering lands similarly situated have been permitted to complete entry upon payment of \$1.25 per acre, for which they have received patent; but this fact, if admitted, would not be sufficient reason for further permitting the entry of land at \$1.25 per acre, which under the law is required to be disposed of at the double minimum rate.

An analogous question was involved in the case of *United States v. Healey* (160 U. S., 136). The act of March 3, 1877 (19 Stat., 377), fixed the price at which desert-lands should be sold at one dollar and twenty-five cents per acre. So far as the terms of the act itself are concerned, it applied to "any desert-land," no exception being made therein of land of that description situated within the limits of railroad grants. At that time there was in force the act of March 3, 1853 (10 Stat., 244), subsequently section 2357 of the Revised Statutes, which expressly declared in the proviso thereto that the price to be paid for alternate reserved lands along the line of railroads within the limits defined by any act of Congress should be two dollars and fifty cents per acre. It was held in *Healey* case that the act of 1877

did not repeal the proviso to section 2357 of the Revised Statutes, and that prior to the act of 1891 desert-lands within railroad limits could not be disposed of at less than two dollars and fifty cents per acre. Based on that case, the Department has authorized repayment in cases where prior to the amendatory act of 1891 persons had been erroneously allowed to make entries of desert-lands within alternate even-number sections within railroad limits upon payment of only one dollar and twenty-five cents per acre, which entries were afterwards canceled, on the ground that such lands were not disposable at that price (31 L. D., 277).

In the case of Thomas Emanuelson (37 L. D., 687), the land involved was within the limits of the grant made to the Chicago, St. Paul, Minneapolis and Omaha Railroad Company, and was increased to two dollars and fifty cents per acre and offered at that price prior to January, 1861. The price of lands raised to two dollars and fifty cents per acre and put in market prior to January, 1861, by reason of the grant of alternate sections, for railroad purposes, was reduced to one dollar and twenty-five cents per acre by the act of June 15, 1880 (21 Stat., 237). The land embraced in Emanuelson's entry subsequently fell within the limits of the grant to the Northern Pacific Railroad Company as fixed by definite location, July 6, 1882, and notwithstanding the reduction by the act of 1880, it was held that the price was again raised to two dollars and fifty cents per acre by said grant, which it appears Emanuelson paid, and consequently that he was not entitled to repayment of the alleged excess of one dollar and twenty-five cents per acre.

The decision of your office herein is affirmed.

SELECTIONS UNDER ACT OF JULY 1, 1898—NONCONTIGUOUS TRACTS.

WILLIAM M. SLUSHER.

Selection by an individual claimant in lieu of an *uncompleted* claim relinquished under the provisions of the act of July 1, 1898, is restricted to land in one compact body, in conformity with the law under which the original claim was initiated; but selection in lieu of a *completed* claim may be made of noncontiguous tracts, provided it is confined to one transaction and to lands in the same land district.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, December 4, 1909.* (S. W. W.)

This is the appeal of William M. Slusher from your office decision of June 24, 1909, rejecting his application to select, under the act of July 1, 1898 (30 Stat., 597, 620), the unsurveyed NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 8,

and SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 32, T. 4 N., R. 39 E., Miles City, Montana, land district, in lieu of the S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 17, T. 1 N., R. 30 E., La Grande, Oregon, formerly embraced in his homestead entry No. 4623, covering the S. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, said Sec. 17, which said homestead entry was relinquished under the provisions of the act of July 1, 1898, *supra*.

The reason assigned by your office decision for rejecting the application is that neither the law nor instructions contemplate the division of the original claim and the lieu selection; that the act of 1898 allows the transfer of the relinquished claim to an equal quantity of other land and it anticipates the selection at one time and in one transaction of all the lands to which the transferee is entitled; and that while the selector may, of course, select a smaller quantity than that to which he is entitled, if he does so it must be in full satisfaction of all the land relinquished.

The appeal charges error in your decision requiring the individual claimant under the act of 1898, to make one selection in satisfaction of his claim, which may consist of several tracts, while your office has permitted the railway company, without question, to divide its claims in accordance with the smallest legal subdivision. It is charged that the action of your office is not only inconsistent with the act in question but is also contrary to the general rule of law and is out of harmony with the settled practice of the land department with relation to other land rights of a similar character.

That portion of the act of 1898, *supra*, regarding the lieu selection to be made by the railroad company, provides that:

The railroad grantee, or its successor in interest, upon a proper relinquishment thereof, shall be entitled to select in lieu of the land relinquished an equal quantity of public lands, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim or not occupied by settlers at the time of such selection, situated within any State or Territory into which such railroad grant extends, and patents shall issue for the land so selected as though it had been originally granted.

The language of the law providing for the transfer of the individual claim is as follows:

That all qualified settlers, their heirs or assigns, who, prior to January one, eighteen hundred and ninety-eight, purchased or settled upon or claimed in good faith, under color of title or claim of right under any law of the United States or any ruling of the Interior Department, any part of an odd-numbered section in either the granted or indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of such grantee or its lawful successor is claimed to have attached by definite location or selection, may in lieu thereof transfer their claims to an equal quantity of public lands surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim, or not occupied by a settler at the time of such entry, situated in any State or Territory into which such railroad grant extends, and make proof therefor as in other cases provided; and in making

such proof, credit shall be given for the period of their *bona fide* residence and amount of their improvements upon their respective claims in the said granted or indemnity limits of the land grant to the said Northern Pacific Railroad Company the same as if made upon the tract to which the transfer is made.

Inasmuch as it was stated in the appeal that your office has in no case required the railroad company to exhaust in one transaction any particular right based upon a claim retained by an individual, but has permitted the company to satisfy its claim by making selections according to smallest legal subdivisions, at its option, informal inquiry was made of your office and this statement found to be correct.

It will be observed from the language of the act quoted above that the law makes very little difference between the selection of the lieu lands by the railroad company and the transfer of his claim by the individual. That some difference was necessary is evident from the fact that the individual claimant might transfer an imperfect or incomplete claim, as well as a perfect or completed one, and with respect to the former it was of course necessary for him to continue to comply with the requirements of the law under which his original claim had been initiated; in which event it would be necessary for him to select lieu land in one body.

Paragraph fourteen of the regulations of February 14, 1899 (28 L. D., 103, 109), which were issued under the act of 1898, provides that:

Lands selected by an individual claimant in lieu of other lands, the claim to which has *not* been carried to final entry and certificate, or the submission of final proof entitling him to final entry and certificate, must be in a compact body and be of the character subject to entry under the particular law controlling the claim relinquished, and this applies whether the lands selected are surveyed or unsurveyed.

It does not appear that the particular question involved herein has ever been heretofore considered by the Department, and there being no precedent, and the statute being silent on the subject, the disposition of this question must be determined by the course of procedure which has been adopted under other statutes similar in form and purpose.

It has been held that under the act of February 24, 1905 (33 Stat., 813), which had reference to homestead claims within the limits of the Mobile and Girard grant in Alabama, the right to transfer a completed homestead claim should not be restricted to a compact body of contiguous land, such as the applicant would have been required to enter had he been applying to make an original homestead entry, but that it would be sufficient if all of the land to which the applicant was entitled was selected at one and the same time and within the same land district. It will be observed that the act of 1905, like the act of 1898, provides for the transfer of individual

claims in conflict with railroad claims, and the purpose and language of the two acts are similar.

Under the act of June 4, 1897 (30 Stat., 11, 36), which provides for the exchange of lands in private ownership within forest reserves, the individual who reconveys to the government the land owned by him in a forest reserve is required to select at the same time all of the lieu lands to which he is entitled, but he is not required to select such lieu lands in a compact body or even in contiguous tracts. See *Emil S. Wangenheim* (28 L. D., 291).

The purpose of the act of 1898 was to afford a means whereby the conflicting claims of the Northern Pacific Railroad Company and individuals, under various public land laws, might be adjudicated without the necessity of resorting to litigation in the courts. The act recognized the fact that either the claim of the individual or the claim of the railroad company would be valid in the absence of the other, and, in order that the conflict might be adjudicated in an expeditious and mutually satisfactory manner, provision was made whereby the individual claimant who came within the limitations of the act would be afforded an opportunity of electing whether or not he would retain the land or relinquish in favor of the railroad company. Upon the relinquishment of the individual claimant he is allowed to transfer his claim, so relinquished, to other public lands within the limitations imposed by the act. As above stated, if the claim of the individual is an incomplete one, it follows, as a matter of course, that in selecting lands in lieu thereof he must conform to the requirements of the law under which the original claim was initiated. But, if the claim of the individual be a completed one, and there remains nothing to be done except to make selection of the lieu land, there appears to be no good reason why he should be restricted to the selection of a compact body, or even of contiguous tracts, but it will be satisfactory if the lieu selection is confined to one transaction, and, necessarily, to the same land district.

It appears that Slusher relinquished to the United States a homestead entry embracing 160 acres of land, and that he attempted to locate the 80 acres involved herein, and also another tract of 40 acres, in the same land district, the same being embraced in two different selections, both of which were rejected by your office for the reason stated herein.

Inasmuch as Slusher might have, under the rule laid down herein, selected the tracts if he had embraced them all in one entry, there seems to be no good reason why he should not be allowed to do that now; and he should also be allowed a reasonable time in which to fill his selection by including another tract and thus satisfying his entire claim. The action of your office is modified accordingly.

CANE ISLAND, ARKANSAS—DISPOSAL OF LANDS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 7, 1909.

REGISTER AND RECEIVER,
Little Rock, Arkansas.

GENTLEMEN: By act of Congress approved March 2, 1909 (35 Stat., 684), it was provided that the survey of lands on what is known as Cane Island, situated in St. Francis River, in T. 14, R. 6 E., 5th P. M., Craighead County, Arkansas, made under the authority of the State of Arkansas in the year 1898, shall, upon the filing in the local land office and with the Commissioner of the General Land Office of a plat of said survey and the field notes thereof, be accepted as the governmental official survey of said body of land.

It appears that upon receipt of the plat and field notes of said survey in this office it was found, in attempting to verify the work of the Arkansas survey and to construct an official plat therefrom, by this office, that there were unallowable errors in closings and indefinite terms used in the field notes which precluded the preparation of such plat, and it became necessary to send an examiner of surveys to Cane Island, Arkansas, and survey out by appropriate methods the claims of the occupants, to the end that the necessary steps might be taken to carry out the provisions of said act of Congress. Such examiner of surveys having submitted supplemental field notes of said survey, examined in accordance with the directions of his special instructions, and a supplemental plat thereof having been constructed, which said plat was accepted by this office on November 12, 1909, and a certified copy thereof filed in your office, you are advised that the *bona fide* occupants and owners of improvements situated upon any of the blocks returned by said survey shall have the preference right at any time prior to March 2, 1910, to make entry under the provisions of the homestead laws for the land so occupied, and upon which their improvements are situated, as their respective interests may appear, or to make purchase of such lands at the rate of \$1.25 per acre; and as it appears that none of the lots comprised in said survey exceed in area 160 acres, you will duly notify the parties mentioned in the schedule accompanying these instructions,^a of their preference right to make such entry or purchase of the lands prior to March 2, 1910.

Applicants prior to March 2, 1910, must file with their said applications, their affidavits, duly corroborated, setting forth the fact that on March 2, 1909, they were *bona fide* occupants and owners of im-

^a Schedule omitted.

provements situated upon the blocks shown by the amended plat of survey for which they make application.

In case entry is made under the homestead laws, you will use the regular homestead application, indorse thereon "under the act of March 2, 1909," and require the payment of the proper fees and commissions. In case of application to purchase, you will use the regular form, 4-001, indorsed thereon in like manner, "under the act of March 2, 1909."

Applicants to purchase must publish notice of their application in such manner as is required under the homestead laws, and you will make proper posting of notice in your office. The notice must describe the land applied for and recite that applicant claims to have been, on March 2, 1909, a *bona fide* occupant and owner of improvements situated on the land applied for. After notice has been published for the prescribed period and no protest has been filed, and all payments have been made, the Register will issue the usual final cash certificate, form 4-189, making reference thereon to the act of March 2, 1909.

In case there are adverse claims to any of the lands involved, or protest filed against the allowance of the said applications by any of the parties named in said schedule, you will forthwith forward said adverse claims or protests, together with the applications involved, by special letter to this office for consideration.

You will reject all applications filed prior to March 2, 1910, where the applicant does not show that he was on March 2, 1909, the *bona fide* occupant and owner of improvements situated on the block applied for.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

R. A. BALLINGER,
Secretary.

FORT BUTLER MILITARY RESERVATION—DISPOSAL OF LANDS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 7, 1909.

REGISTER AND RECEIVER,
Tucumcari, New Mexico.

SIRS: I am in receipt of your letter dated November 20, 1909, making report in regard to the sale of the undisposed of lands in the Fort Butler abandoned military reservation, which was authorized

to take place on November 15, last, by instructions of August 31, 1909. It appears that there were offered for sale on the date mentioned, 2,683.80 acres, which were appraised at \$1.25 per acre, and that there were sold 888.29 acres, at \$1.25 per acre, the total price being \$1,110.37. There are unsold 1,795.51 acres, which were appraised at \$1.25 per acre. In your report you state that you doubt very much if the land can be sold at the price put upon it by the appraisers, as it is bounded by cap rock about fifty feet high and running from that down in rocky bluffs, to the boundaries of the reservation. The lands in said reservation were offered for sale on March 15, 1905, and none of the lands were sold for want of bidders. The unsold lands having been twice offered for sale, in accordance with the provisions of the act of July 5, 1884 (23 Stat., 103), are subject to disposal at private sale at not less than the appraised price, \$1.25 per acre.

You issued cash certificates Nos. 1, 2 and 3, for the lands disposed of at said sale, whereas, under the instructions, you should have given said cash certificates the usual serial numbers, as provided in the instructions of June 10, 1908 (37 L. D., 46). Said certificates are therefore hereby returned and you will cancel said cash certificates Nos. 1, 2 and 3, and give the certificates the usual serial numbers and transmit them with your monthly returns.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

FRANK PIERCE,
First Assistant Secretary.

**SOLDIERS ADDITIONAL—SITUS OF RIGHT—DECREE OF SALE—JOINT
HEIRS—PARTITION OF RIGHT.**

PETER WHITNEY.

A judicial proceeding for the purpose of fixing the ownership and decreeing sale of the additional right of a soldier who died intestate without having exercised the right must be instituted in the probate court having jurisdiction over the situs of the right, which in such case is the domicil of the soldier at the time of his death, and so remains as long as the probate court has power of administration thereover; and sale of the right under decree of a court not having such jurisdiction is ineffective to convey title thereto.

The land department has no authority to coerce one of several heirs to a soldiers' additional right to assign his interest therein, or to partition in severalty a right held by several heirs jointly.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, December 8, 1909.* (J. R. W.)

Peter Whitney, claiming to be assignee of heirs of Richard W. Whittington, appealed from your decision of June 22, 1909, rejecting Whitney's location of Whittington's additional homestead right under section 2307 of the Revised Statutes, on SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 1, and SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 2, T. 9 N., R. 1 E., Rapid City, South Dakota, offered as substitute for right of Elizabeth A. Hummel, widow of George Hummel, attempted November 23, 1906, to be located by him on the same land, rejected by you for lack of proof of identity of the soldier with the entryman, October 7, 1908, and affirmed by the Department, January 23, 1909 (unreported). The question involved in this appeal is the sufficiency of the evidences of transfer to vest Whittington's right in the claimant Whitney.

The papers contain a certificate of the Adjutant-General of Illinois, that Richard W. Whittington enlisted July 28, 1862, in Company D, 72d Illinois Volunteer Infantry, and served until his honorable discharge June 10, 1865, then sick, at Jeffersonville, Indiana. There is proof by affidavits tending to show that he made homestead entry for S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 10, T. 96 N., R. 37 W., eighty acres, Clay County, Iowa, and there died intestate, March 7, 1870; that his estate was never probated; that he left a widow, Francelia, who remarried January 27, 1876, and three children—Cyrus H., Arthur W., and Mary M. Whittington. There are assignments by Francelia Murphy, the widow, remarried, and by Mary M. Whittington and Cyrus H. Whittington. Arthur W. Whittington, so far as the record shows, has not assigned.

There is also a purported assignment of the entire right by Wallace Taunton, receiver, which recites that at the February, 1907, term of the District Court, Monroe County, Iowa, John R. Clark filed a petition alleging death of Whittington, failure to take administration, the military service, the original homestead entry, the grant to him of additional right, who were his widow and children, assignments by all except Arthur, and as to his interest, that plaintiff—had learned in a general way that one Milo B. Stevens & Company had possibly received an assignment of his interest, but whether he had or not plaintiff is unable to say; that John R. Clark, as plaintiff, and Milo B. Stevens & Company, or Arthur W. Whittington were the absolute owners of said additional homestead right; that is, that John R. Clark is owner of $\frac{3}{4}$ and Arthur W. Whittington or Milo B. Stevens & Company owner of $\frac{1}{4}$, asking it be decreed accordingly.

The receiver's assignment also recites that plaintiff filed his affidavit that the parties defendant "and all unknown owners or claimants" were non-residents of Iowa, so that personal service on them could not be made in the State; that on this showing service by pub-

lication was ordered by the court and made, and April 9, 1907, the court by decree fixed the interests to be three-fourths in John R. Clark and one-fourth in Arthur W. Whittington, and as the right was not partitionable appointed Wallace Taunton receiver of it, and authorized him to sell it, which he did June 3, 1907, to John R. Clark, reporting such sale to the court, which approved it June 8, 1907, in professed pursuance to which authority Wallace Taunton, June 5, 1907, three days before approval and authority of the court, assigned the entire right to John R. Clark, under whom Whitney claims.

You held that the court had no jurisdiction to appoint such receiver or to decree the title to the right in John R. Clark or any other person, and that the transfer by the receiver conveyed no title and would not be recognized.

The appeal contends that the situs of the property is fixed in Iowa, because the soldier died there, and that the courts of Iowa have jurisdiction to determine all rights of property situate in that State. The latter proposition may be conceded. The first, however, is not true.

Counsel's argument is self-destructive, for, if the situs of the right was fixed by Whittington's death in Clay County, how can the court of Monroe County, one hundred and ninety miles away as the bird flies, take jurisdiction or compel an adverse claimant to litigate there? Counsel cite no statute of Iowa, nor has the Department found any authorizing the courts of Monroe or any other county to assume or exercise jurisdiction over property the situs of which is in Clay, or any other county than that of the court taking jurisdiction.

It is a general rule respecting chattel property that its situs is presumably at the owner's domicil. As to tangible things, the rule is much modified by conditions of modern society and commerce, for one resident in one State may own tangible chattels actually situate remotely from him in another jurisdiction. As to tangible things, courts assume and act on the title of any chattel that they can subject to their actual caption. Intangible things follow the person of the owner and title thereto is affected by no proceeding, except jurisdiction exists over the owner's person.

When Whittington died, the situs of the right was in Clay County, Iowa, but section 3305, Iowa Code (1897), provides that:

Administration shall not be originally granted after the lapse of five years from the death of decedent, or from the time his death was known in case he died out of the State.

It was held in *Cummins v. Lynn* (121 Iowa, 344, 345) that at expiration of the time mentioned by this section, "the personal estate of decedent, if any he had, vested, absolutely in his heirs," citing decisions of that State making this rule the settled law of that jurisdiction. It being intangible property—the mere right to make a loca-

tion or entry of public lands—till exercised it had no situs other than the owner's will, necessarily in himself, wherever he was. Neither Arthur W. Whittington, nor yet Milo B. Stevens & Company, was served with original notice, and both were stated by plaintiff himself to be non-residents of Monroe County and of the State of Iowa. The record of the proceeding so showed on its face that the court had no jurisdiction of it.

Counsel suggest that if the assignment is not good, the case be remanded to your office, "with direction that notice be served on this remaining heir or his assignee, advising him of pendency of this application and that he be allowed a specified time to show cause why this application may not be allowed."

This can not be done, because the land department has no authority to coerce one of several heirs to assign his interest in a right of this kind. That belongs, if it exists at all, to the proper civil courts having jurisdiction of his person. It may be that such courts have power to coerce him to assign his interest on equitable terms to prevent entire lapse of the right. Such power is proper subject for such courts, in first instance at least, to determine for themselves. The full jurisdiction of the land department is exhausted when it determines whether or not an applicant to exercise and locate the right shows he has complete title and right to exercise, locate, and satisfy it.

Counsel also suggest that the Department, in exercise of administrative powers, allow applicant "the existing right of sixty acres—three-fourths—and privilege of supplying an additional piece to cover the remaining twenty acres." This the Department can not do, as it calls for partition in severalty of a right held by several jointly, and is beyond power of the Department for the same reason applicable to the prior suggestion.

Your decision is affirmed.

**CONTESTANT'S PREFERRED RIGHT OF ENTRY—RIGHT OF ENTRYMAN
AFTER CANCELLATION OF ENTRY.**

THORBJORNSON v. HINDMAN.

After an entry has been regularly canceled as result of a contest, the entryman has no interest in the land that entitles him to be heard with respect to the contestant's right of entry.

The preferred right of a successful contestant can not be defeated by a claim of adverse settlement initiated by the entryman subsequently to the initiation of the contest.

The presence of improvements on a tract of land will not exclude it from appropriation under the timber and stone act, if not made and maintained under a *bona fide* occupation of the land.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, December 9, 1909.* (C. J. G.)

An appeal has been filed by Oliver Thorbjornson from the decision of your office of July 14, 1909, dismissing his protest against the timber and stone application of Martha A. Hindman for the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 1, and E. $\frac{1}{2}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 12, T. 18 S., R. 10 E., The Dalles, Oregon.

This land was formerly embraced in a homestead entry of Oliver Thorbjornson, protestant herein, made July 22, 1903, and which was contested, October 26, 1906, by Martha A. Hindman, protestee herein, on the ground of failure to reside upon, improve, and cultivate said land as required by law. Hearing was had and upon the testimony the local officers rendered decision February 11, 1907, recommending cancellation of the entry. This decision was upon appeal affirmed by your office December 26, 1907, and by the Department upon further appeal August 7, 1908. No motion for review appears to have been filed. In the exercise of her preference right Martha A. Hindman filed timber and stone application for the land, September 11, 1908, and notice was given of her intention to submit final proof on January 19, 1909, before a United States commissioner at Bend, Oregon, final hearing to be had before the local officers January 26, 1909.

November 20, 1908, Thorbjornson filed protest against allowance of Hindman's application, alleging that the same was not made in good faith, as she knew the land was occupied by him; that when said application was made three acres of the land were cleared, plowed, and in cultivation, and one additional acre was cleared ready for cultivation; that twenty acres of the land were fenced with a good wire fence; that there was a box house, ten by fourteen feet, comfortably furnished, and a good well, and that all of these improvements belong to him.

It was further alleged in said protest that the land is more valuable for agricultural purposes than for its timber; that at the time Hindman's application was filed Thorbjornson was an actual resident of the land and occupying it as his home; that he entered upon said land as a homesteader on or about August 25, 1908, and has since continuously resided there, and that he is qualified to make homestead entry for said land under the act of February 8, 1908 (35 Stat., 6).

A hearing was had before the officer designated, both parties being present with witnesses, and upon the testimony submitted the receiver held that the land is more valuable for its timber than for any other purpose, while the register held to the contrary. Your office concurred in the finding of the receiver.

It appears that subsequent to departmental decision of August 7, 1908, to wit, August 27, 1908, Thorbjornson filed relinquishment of

his homestead entry, and its cancellation was noted on the records of the local office. It is conceded by him that said relinquishment was the result of Hindman's contest. The latter was notified of her preference right, and she applied to enter the land under the timber and stone law, as hereinbefore stated.

As to the character of the land in question, it is sufficient to say, after careful examination of the entire record, that the Department concurs in the finding of your office, that this land is subject to purchase under the timber and stone act. In the view of the Department this is a matter in which Thorbjornson is not lawfully concerned. After an entry is regularly canceled on contest, the defendant therein has no interest in the case that entitles him to be heard in the matter of the contestant's right of entry. *Logue v. O'Connor* (12 L. D., 32). It is true that section 2 of the timber and stone act of June 3, 1878 (20 Stat., 89), requires an applicant thereunder to file a statement setting forth, among other things, that the land is uninhabited and contains no improvements, save such as are made by or belong to the applicant. In her timber land application Hindman stated that the land was uninhabited, except "a lumber cabin and small log barn which belonged to a former homesteader." In her final proof she stated, in answer to the question as to whether the land was occupied or had improvements thereon: "(a) The man that I contested was there the last time I was there in November. Said he was trapping. (b) Former entryman had a small cabin on it—some barbed wire poorly stretched, a start of a barn. This claim he relinquished after I had won out in a contest against him." Thus, there was no concealment as to the true condition of the land at date of her application. An application to purchase under the timber and stone act, filed in due time, is a valid exercise of the preference right obtained by a successful contest against a homestead entry covering the same land. *Harris v. Heirs of Ralph Chapman* (36 L. D., 272).

Upon contest regularly initiated and prosecuted, it was shown that Thorbjornson had failed to reside upon the land under his homestead entry. Nothing that he could do on the land after he was contested could be of any advantage to him. Not even a stranger could gain any right as against Hindman by going upon the land after contest and prior to expiration of the period accorded her in which to exercise preference right, much less Thorbjornson. The preferred right of a successful contestant can not be defeated by an adverse settlement claim acquired subsequently to the initiation of a contest. *Hodges et al. v. Colcord* (24 L. D., 221); *Skaggs et al. v. Murray* (26 L. D. 30). Having failed to reside upon the land prior to contest, any improvements Thorbjornson may have had there could not avail him, and this was equally true after judgment against him and prior to the expira-

tion of the preference right period. The presence of improvements made on a tract of land will not exclude it from disposal under the act of June 3, 1878, if said improvements are not made and maintained under a *bona fide* occupation of the land. *Miller v. McMillen* (14 L. D., 160); *Kingston v. Eckman* (22 L. D., 234).

In the case of *Hammel v. Salzman* (17 L. D., 496), referring to section 2 of the act of June 3, 1878, it was said:

It would be a strained and unwarrantable interpretation to place upon the term "uninhabited," contained in this section, that such land should not be purchased, if perchance some one lived thereon, however lacking in good faith such settlement might be. If such construction were placed upon the act, it would follow that none of these lands could be entered under its evident intent, where any form of settlement existed, however fraudulent and illegal the residence might be.

In the timber-culture case of *Crooks v. Guyot* (4 L. D., 508), it was held that an entryman who has failed to comply with the law has forfeited all right to the land, and can not set up his possession to defeat the application of a contestant.

The decision of your office herein is affirmed.

**RIGHT OF WAY—PRIORITY OF APPLICATION—RESERVOIR SITE—ACT
OF MARCH 3, 1891.**

ANDERSON ET AL. *v.* SPENCER ET AL.

The filing of an application for right of way for a reservoir site under the act of March 3, 1891, following survey and definite location in the field, confers upon the applicant no such rights as will overcome the rights of an adverse claimant who commenced survey of a conflicting reservoir site prior to the initiation of any rights by the applicant and diligently prosecuted the same to completion.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, December 11, 1909.* (G. B. G.)

This is the appeal of George G. Anderson and Winfield Holbrook, locators of the Pine Creek Reservoir, Leadville, Colorado, land district, from your office decision of March 26, 1909, rejecting their application for right of way under the act of March 3, 1891 (26 Stat., 1095), because of conflict with the location of Pine Creek Reservoir No. 1, by Charles Spencer and Howard E. Burton.

It appears that Anderson and Holbrook began their survey of the reservoir site in question August 7, 1908. This survey was completed August 20, 1908, and adopted as a definite location August 22, 1908; but the map and field notes constituting their application were not filed in the district land office until September 21, 1908.

Spencer and Burton began their survey of said reservoir site August 10, 1908. This survey was completed and adopted as their definite location August 18, 1908, and the map and field notes constituting their application were filed in the district land office September 17, 1908.

As thus stated, the only question in this case is one of priority of right; and considering that question, your office in its said decision of March 26, 1909, said:

The first-named applicants [Spencer and Burton] are prior in time as to the filing of their application in the local land office, and as to the adoption of the survey as the definite location of the reservoir site. The conflict is of such a nature that both applications cannot be approved. In the absence of any showing in such cases, the date of the filing governs the priority of right; and the application of Anderson and Holbrook being subsequent to that of Spencer and Burton, is hereby held for rejection, subject to the right of appeal to the Secretary of the Interior.

The Department cannot concur in this disposition of the case. It is true that in some cases, priority of application secures priority of right; but this is not true in every case, and cannot be admitted under the facts of this case. The survey of Anderson and Holbrook was begun in the field prior to that made by Spencer and Burton, and it is not shown or alleged that Anderson and Holbrook were in default or unreasonably delayed the prosecution of the necessary preliminary work, but on the contrary it appears that this work was done with all reasonable despatch and that their application based thereon was filed in the local land office in regular course. This being true, it is not perceived by what course of reasoning it may be well said that an adverse interest may be created by persons coming into the field subsequently, and by prosecuting their preliminary work with greater despatch, thereby place themselves in position to claim priority of right because of a prior application at the district land office.

In the case of *D. A. Lord and M. C. Smith v. William H. Foster and William H. Baker*, on review, this Department, November 26, 1909, considering this question, said:

While it is true that as a rule the filing of the application in the local office is considered as the initiation of a claim under the act of 1901, it does not follow that in every case priority of filing will be recognized as priority of right. The regulations approved July 28, 1901 (31 L. D., 13), provide, in paragraph 3 thereof, that application for permission to use a right of way must be filed and permission granted before any rights can be claimed thereunder. The regulations further provide that the application shall be made in the form of a map and field notes, which clearly and necessarily contemplate that prior to filing the application the applicant must make a survey of the land. The Department recognizes the fact that the execution of a proper survey of a large plant necessarily involves time; and to lay down a strict rule to the effect that priority of right must invariably depend upon priority of filing, would be unjust and incompatible with good administration.

It is true that this was said with reference to an application under the act of February 15, 1901 (31 Stat., 790); but if it might be well said of such an application, it may with better reason be said of an application under the act of March 3, 1891, because under the last-named act rights may not only be initiated by the making of a survey, but vested rights may be secured by the completion of such survey followed by actual construction upon the ground; so that under the act of March 3, 1891, rights may be secured by the diligent prosecution of field work, without reference to permissible procedure before the land department looking towards the approval of maps of such right of way.

The decision appealed from is reversed, and the case is remanded with directions to allow the application of Anderson and Holbrook, unless objection appear other than that herein considered.

SOLDIERS' ADDITIONAL—DEATH OF SOLDIER AND WIDOW—RIGHT OF WIDOW'S HEIRS.

ISABELLE L. THOMPSON.

In case a soldier entitled to an additional right under section 2306, R. S., dies without exercising it, leaving a widow, his sole heir, and she dies without appropriating the right under section 2307, it becomes an asset of her estate, by virtue of her inheritance of the soldier's estate, and descends to her heirs.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, December 11, 1909.* (G. B. G.)

This is the appeal of Isabelle L. Thompson from your office decision of October 23, 1909, denying her, as the remote assignee of one Albert Beal, claiming to be the heir of John T. Merchant, deceased, the right to make soldiers' additional entry for the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 2, and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 34, T. 19 S., R. 14 W., Las Cruces land district, New Mexico.

It appears that the said John T. Merchant died seized of a soldiers' additional right to enter eighty acres of land. He left surviving him a widow, but no children. Subsequently, the widow died, not having asserted a claim to such additional right under section 2307 of the Revised Statutes. It is said that she left surviving her as her only heir-at-law, her brother, the said Albert Beal.

If this state of facts is borne out by the record, the Department dissents from the view taken of this case by your office. In the course of your said office decision it was said:

According to section 2307 R. S. the widow of the soldier is entitled to the additional right, or, in case of her death or remarriage, his minor orphan chil-

dren are entitled. From the evidence, there does not appear to be any of these to succeed to said alleged right. Neither does there appear to be any adult heirs of the soldier, or other legal representative. Albert Beal is the heir of the soldier's widow, and not of the soldier, and there is no provision of law causing the right to descend to him. The applicant therefore has not shown ownership.

It has been repeatedly held by this Department that upon the failure of a soldier to exercise the additional homestead right under section 2306 of the Revised Statutes during his lifetime, such right may, under section 2307 of said statutes, be appropriated by his widow during her life and widowhood, or, in the event of her death without so appropriating it, then by the soldier's minor orphan children during their minority, through a guardian duly appointed and officially accredited at the Department of the Interior, and that *in the instances where it is not so appropriated, the estate of the soldier is not divested thereof*. (See Allen Laughlin, 31 L. D., 256; David Werner, 32 L. D., 295; and Edgar A. Coffin, 33 L. D., 245.)

In this case, the additional right of the soldier, as above stated, was not asserted by his widow, and it is said he left no children. His estate was not, therefore, divested of this right by virtue of anything contained in or proceeding had under section 2307 of the Revised Statutes. But if the allegations of the appellant are true, the soldier's widow, under the laws of the State where he died, would appear to be the heir, and although she failed to appropriate the benefits conferred on her by section 2307 of the Revised Statutes, in that event she took this estate as the heir of her husband, just as she took any other personal property or incorporeal hereditament owned by him at the time of his death. At the time of her death, therefore, being such sole heir, she was the owner of this right, and as an asset of her estate not devised, it descended upon her death to her heir-at-law, who is said to be her brother, the said Albert Beal.

Inasmuch as your office has not, in this view of the law, passed upon the sufficiency of the showing made in support of the application, the case is remanded for further consideration.

FLATHEAD INDIAN RESERVATION—SCHOOL INDEMNITY.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., December 11, 1909.

REGISTER AND RECEIVER,

Kalispell, Montana.

SIRS: The act of April 23, 1904 (33 Stat., 302), provides that the Secretary of the Interior should cause to be surveyed all of the Flathead Indian Reservation in the State of Montana, as described in

article two of the treaty of July 16, 1855, such description being as follows:

Commencing at the source of the main branch of the Jocko River; thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko to a point on Clarke's Fork between the Camash and Horse prairies; thence northerly to, and along the divide bounding on the west the Flathead River, to a point due west from the point half way in latitude between the northern and southern extremities of the Flathead Lake; thence on a due east course to the divide whence the Crow, the Prime, the Soni-el-em and the Jocko Rivers take their rise, and thence southerly along said divide to the place of beginning.

It is further provided under the act of April 23, 1904, that as soon as the said lands have been surveyed the same shall be classified and appraised, being divided into agricultural lands of the first and second class, timber lands, mineral lands and grazing lands.

Section 8 of the act provides that on the completion of the appraisement:

The land shall be disposed of under the general provisions of the homestead, mineral, and town-site laws of the United States, except such of said lands as shall have been classified as timber lands, and excepting sections sixteen and thirty-six of each township, which are hereby granted to the State of Montana for school purposes. And in case either of said sections or parts thereof is lost to the said State of Montana by reason of allotments thereof to any Indian or Indians now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract under consideration, to locate other lands not occupied, not exceeding two sections in any one township, and such selections shall be made prior to the opening of such lands to settlement.

Section 11 thereof, as amended by the act of March 3, 1909 (35 Stat., 781, 796), provides:

That all merchantable timber on said lands returned and classified by said commission as timber lands shall be sold and disposed of by the Secretary of the Interior, for cash, under sealed bids or at public auction, as the Secretary of the Interior may determine, and under such regulations as he may prescribe: *Provided*, That after the sale and removal of the timber such of said lands as are valuable for agricultural purposes shall be sold and disposed of by the Secretary of the Interior in such manner and under such regulations as he may prescribe.

Section 22 of said act of March 3, 1909, provides:

That the Secretary of the Interior be, and he is hereby, authorized in his discretion to reserve from location, entry, sale, or other appropriation all lands within said Flathead Indian Reservation chiefly valuable for power sites or reservoir sites.

The act of May 23, 1908 (35 Stat., 251, 267), provides that the President shall—

reserve and except from the unallotted lands now embraced within the Flathead Indian Reservation, in the State of Montana, not to exceed 12,800 acres of land . . . for a permanent national bison range—

for which tracts the Indians shall be paid the appraised value.

By the act of March 4, 1909 (35 Stat., 1039, 1051), an additional sum is appropriated to increase the bison range reservation to a total of 20,000 acres of unallotted Flathead lands.

The grant of sections 16 and 36 to the State of Montana, contained in the act of 1904, *supra*, attached upon the survey of the lands, and if, at date of such survey, the sections had not been disposed of or reserved for any purpose, title immediately vested in the State. Therefore, it is held that such nonmineral, unallotted sections 16 and 36 within the bison range, and the power site or reservoir site reservations as had been surveyed prior to such reservation passed to the State, and that such sections 16 and 36 which were *not* at date of such reservation surveyed, did not pass to the State, but that the State must select indemnity in lieu thereof. The State's right of selection under the provisions of the act of April 23, 1904, is restricted to lands "not occupied" and not exceeding two sections (1,280 acres) in area in any one township within the boundaries of the lands described, in lieu of lands of equal acreage in school sections 16 and 36 within said area lost to the State, by reason of allotments to Indians or otherwise. The selections must be made prior to the opening of the lands to settlement.

The President in proclamation of May 22, 1909, fixed April 1, 1910, as date for making entries under the provisions of the act, and that date must be considered, for the purpose of State selection, as the date of the opening of the lands to settlement.

The selections should be made on the forms used for the selection of indemnity school lands, so modified as to show that applications are made under the provisions of the act of April 23, 1904, and must be supported by the usual non-mineral, non-saline and non-occupancy affidavits.

In view of the fact that claims to these lands by allotment are record claims, and that the selected lands will not be subject to homestead settlement during the period within which the State is authorized to exercise the right of selection, the requirement of publication of notice of selection will be waived, and, as the tracts to be designated as bases for the selections are lost to the State by allotment, or otherwise, no certificates of county officers to show non-sale and non-encumbrance by the State of such base tracts need be furnished.

Lists of selections of the land considered herein, accepted by you, will be given proper serial numbers and will be transmitted to this office in special letters. Care must be taken to place notations, showing the fact and date of transmittal, in each case, in the column for remarks in the "schedule of serial numbers" for the month in which the lists are accepted and transmitted.

You have been furnished with a copy of the schedules of allotments made to the Flathead Indians on the reservation above de-

scribed, except a small schedule recently approved, of which you will be furnished a copy in the near future. You have also been furnished with information as to all changes made in said allotments since the copy of the schedule was made. The classifications and appraisements have been made and the lists thereof are now in this office. You will in the near future be furnished with photographic copies of these lists.

In view of the provisions of section 11 of the act of April 23, 1904, as amended by the act of March 3, 1909, which specifically provides for the sale of all merchantable timber on the lands returned and classified as timber lands, the proceeds to be for the benefit of the Indians, it is held that *none of the lands so classified* as timber are subject to lieu selection by the State, and you will therefore allow no selections upon this class of lands.

You have been advised in several letters of this office of the withdrawal of lands in this reservation for reservoir, power site, town-site, bison range and other purposes. Lands so withdrawn are not subject to State selection.

The Governor of Montana will be furnished with photographic copies of plats showing the lands in this reservation allotted to Indians and otherwise reserved.

You will see that these allotments and the changes made in them are promptly placed of record in your office.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

R. A. BALLINGER, *Secretary.*

HOMESTEADS WITHIN RECLAMATION PROJECTS—STATUS AFTER
PROOF AND RECLAMATION.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 14, 1909.

THE HONORABLE,

THE SECRETARY OF THE INTERIOR,

SIR: I have the honor to acknowledge the receipt, by your reference of the 23d ultimo for an expression of views, of a letter of the same date from the Acting Director of the Reclamation Service, wherein he has requested to be advised as to the construction placed by this office and by the Department on certain provisions of office circular of September 17, 1909 [38 L. D., 229].

The provisions of the circular involved in the request of the Acting Director are in paragraph one thereof, which is as follows:

1. *Notice of acceptance to issue on proof of residence, cultivation, improvement, and reclamation.*

Homesteaders who have resided on, and improved their lands for the time required by the homestead laws and have reclaimed at least one-half of the irrigable area of their farm units as required by the reclamation act, and have submitted proof which has been found satisfactory thereunder by this office, will be excused from further residence on their lands and a notice will be issued to them reciting that the conditions of residence, cultivation, improvement, and reclamation have been complied with, and that final certificate and patent will issue upon payment of the charges imposed by the public notice issued in pursuance of section 4 of the reclamation act. In such cases, upon payment of the charges by the entryman, or in his behalf, final certificate and patent will issue in due course.

These provisions, together with the other provisions of the circular, which has received departmental approval, were adopted as a means of the effective execution of the first paragraph of section 5, act of June 17, 1902 (32 Stat., 388), which is as follows:

Sec. 5. That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the government the charges apportioned against such tract as provided in section four.

It appears from the letter of the Acting Director that his request was made because of a suggestion that the homesteader who has submitted acceptable final proof of residence and improvement under the homestead laws, and evidence of the reclamation of at least one-half of the irrigable area of the farm unit included in his entry, as required by the act mentioned, is in practically the same situation as a private land owner, and is subject to the requirement of the provision of section 5 of the act that:

No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one land owner, and no such sale shall be made to any land owner unless he be an actual *bona fide* resident of such land, or occupant thereof residing in the neighborhood of said land—

thus calling into question the warrantableness of the provision of the circular that such homesteader will be excused from further residence on his land.

In response to the terms of the reference you are informed that the views of this office respecting the status of the homesteader who has met the requirements of the homestead laws as to residence and improvements, and the additional requirement of the reclamation act that he shall reclaim at least one-half of the irrigable area of his farm unit, are that his status is entirely independent of and separate from that of the private land owner, as respects his qualification as a

water user and that such homesteader is not obligated by the act, as is the private land owner, to reside on the land, or to be an occupant thereof residing in the neighborhood of the land, to be entitled to apply for and be awarded a water right.

This is so because the act does not impose such a requirement on the homesteader, he not being a private land owner charged with the requirements as to residence on or occupation of the land, at the date on which he makes application for a water right.

If he is a qualified applicant on that date, under the law, and if his application is allowed on such basis, his status becomes fixed as a legal water user and is not changed because of his fulfilment of the specific requirements of the law imposed on a homesteader.

To place such homesteader in the only other class of water users mentioned in the act, viz., that of the private land owner, and to charge him with the requirements exacted of an applicant in that class, would be to prescribe another and further condition, which would in effect be an enlargement of the act, which it is not competent for the Department to undertake.

Because of the foregoing it appears that the provisions of the first paragraph of the circular of September 17, 1909, fully conform to the requirements of the act and that their adoption is in line with its proper execution.

The referred letter is returned herewith.

Very respectfully,

FRED DENNETT, *Commissioner.*

Approved, December 15, 1909:

R. A. BALLINGER,

Secretary.

REIBER v. STAUFFACHER.

Motion for review of departmental decision of September 15, 1909, 38 L. D., 201, denied by First Assistant Secretary Pierce December 14, 1909.

UNITED STATES MINERAL SURVEYOR—REVOCATION OF APPOINTMENT—SECTION 452, REVISED STATUTES.

PHILIP CONTZEN.

The making of a homestead entry by a United States mineral surveyor is a violation of the provisions of section 452 of the Revised Statutes and he thereby subjects himself to the penalty provided by that section.

Irrespective of the provisions of said section, however, the Commissioner of the General Land Office has authority to revoke the appointment of a mineral surveyor whenever he deems such action necessary or advisable.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, December 14, 1909.* (J. H. T.)

February 1, 1909, you directed the United States Surveyor-General of Arizona to notify Philip Contzen, a mineral surveyor, that he be allowed sixty days from service of notice within which to show cause why his appointment should not be revoked because he had on November 18, 1907, while holding office as United States mineral surveyor, made homestead entry No. 1117, Phoenix, Arizona, series, for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 26, T. 12 S., R. 12 E., contrary to the provisions of section 452 U. S. R. S.

In response thereto Contzen by letter of February 9, 1909, admitted that he had made said entry but claimed that he did so in ignorance of the said statute, and stated that immediately upon learning that he could not legally make the entry while holding such office he relinquished the land in the entry and requested that his commission be not revoked.

April 5, 1909, you took further action in the matter and held that Contzen's ignorance of the law could not be accepted as an excuse for the violation of same, and further stated "there is sufficient evidence before this office of unlawful transactions by him to cast doubt at least upon his ignorance thereof in this particular." You held, therefore, that the showing was insufficient, and you directed the Surveyor-General to revoke his appointment at once, allowing the usual right of appeal.

A motion having been filed upon behalf of Contzen for modification of your decision, which had been made final, you, on October 25, 1909, reconsidered your said decision of April 5, 1909, and modified the language used therein, thereby eliminating the portion which stated that he relinquished his entry only after learning that his official conduct was being investigated, and also that portion which stated that there is sufficient evidence before your office of unlawful transactions by him to cast doubt at least upon his ignorance of the law. You stated as a reason for such action that said statements were not necessary to the conclusion reached as it was admitted by Contzen that he made the entry, and therefore the provisions of said section of the statute mentioned (452) made his removal from office mandatory, and you therefore adhered to the former action taken but allowed a further right of appeal. An appeal from your said last decision has been filed.

Section 452, United States Revised Statutes, provides as follows:

The officers, clerks, and employes in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office.

In the case of Herbert McMicken *et al.* (10 L. D., 97) it was held that:

The disqualification to enter public lands contained in section 452, R. S., extends to officers, clerks, and employes in any of the branches of the public service under the control and supervision of the Commissioner of the General Land Office in the discharge of his duties relating to the survey and sale of the public lands. A timber land entry made by an employe in the office of the surveyor-general of the district in which the land is situated is illegal and must be canceled.

It has also been specifically held by the Department that a United States mineral surveyor is within the prohibitive provisions of the said section of the revised statutes. (See Floyd *et al. v.* Montgomery *et al.*, 26 L. D., 122; Frank A. Maxwell, 29 L. D., 76.) The Supreme Court of Utah held to the same effect in the case of Lavagnino *v.* Uhlig *et al.* (26 Utah, 1), which decision was affirmed by the Supreme Court of the United States (198 U. S., 443), the latter court, however, saying with reference to said section that it was unnecessary in reaching a conclusion in the case to consider the effect of same.

A case still more directly in point is that of Seymour K. Bradford (36 L. D., 61), wherein it was held that a United States mineral surveyor making a mineral location violates section 452 U. S. R. S., and thereby forfeits his official position.

The Department adheres to the opinion expressed in its decisions above cited and therefore finds the action taken to be correct. It may be further stated, however, that so far as this case is concerned it could well be disposed of irrespective of the forfeiture provision of said section.

The statutory authority for the appointment of mineral surveyors is found in section 2334, United States Revised Statutes, which provides:

The surveyor-general of the United States may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims.

The mining regulations (37 L. D., 779) provide:

116. Persons desiring such appointment should therefore file their applications with the surveyor-general for the district wherein appointment is asked, who will furnish all information necessary.

117. All appointments of mineral surveyors must be submitted to the Commissioner of the General Land Office for approval.

118. The surveyors-general have authority to suspend or revoke the commissions of mineral surveyors for cause. Before final action, however, the matter should be submitted to the Commissioner of the General Land Office for approval.

119. Such surveyors will be allowed the right of appeal from the action of the surveyor-general in the usual manner. Such appeal should be filed with the surveyor-general, who will at once transmit the same, with a full report, to the General Land Office.

The power to remove the incumbent of an office is incident to the power of appointment in the absence of some provision of law fixing the duration of the office and the mode of removal. Such office being held at the pleasure of the appointing power, the incumbent may be removed at any time, and charges, notice and hearing are unnecessary. Taylor *v.* Kercheval (82 Fed. Rep., 497); *Ex parte* Hennen (13 Peters, 230); Am. and Eng. En. of Law, 2nd Ed., Vol. 23, 435, 439; Mechem on Public Officers, 284, 287; Throop on Public Officers, 309, 356.

There is ample authority, therefore, for the removal of a United States mineral surveyor from office irrespective of section 452 R. S., and his commission may be revoked whenever his superior officers deem such action necessary. The appointment of Contzen has been revoked by the surveyor-general in accordance with your direction. The record relative to said revocation and concerning his conduct in office has been carefully examined and it is found that the action taken is fully justified.

The same is therefore affirmed.

RECLAMATION FIRST-FORM WITHDRAWAL-HOMESTEAD APPLICATION.

ERNEST WOODCOCK.

An application to make homestead entry for land embraced within a first-form withdrawal under the reclamation act should not be allowed, nor received and suspended to await the possible restoration of the lands to entry, but should be rejected.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, December 14, 1909.* (E. C. F.)

Ernest Woodcock has appealed from your decision of July 15, 1909, in which, affirming the action of the register and receiver at North Yakima, Washington, you rejected Woodcock's application 02586 to make homestead entry for the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 28, T. 13 N., R. 17 E., for the reason that the land is included within a first-form withdrawal under the act of June 17, 1902 (32 Stat., 388), the withdrawal having been made by order of the Secretary of the Interior, dated October 9, 1905. It is urged in the brief and argument of appellant accompanying his appeal, that error was committed in holding that the land was withdrawn from all forms of entry under the reclamation act, for the alleged reason that no irrigation works are to be constructed thereon and the withdrawal for any other purpose is not warranted by the law. It is further contended that the application should have been received and held suspended until

a contestant, who secured the cancellation of a homestead entry formerly embracing this land, had an opportunity to exercise his preference right upon one of the farm units, which it is assumed will be created from the land withdrawn, and thereafter upon the restoration of the lands to entry appellant's application to enter should be allowed.

The act of June 17, 1902, authorizes the Secretary of the Interior to withdraw "from public entry the lands required for any irrigation works contemplated under the provisions of this act." Such withdrawals are legislative in their effect and preclude the allowance of any application or filing therefor under the public land laws. The motives or purposes of the officer making the withdrawal can not be attacked by appellant, for, as held in the case of *Riverside Oil Company v. Hitchcock* (190 U. S., 316), "neither an injunction or mandamus will lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion." In the case of *Wolsey v. Chapman* (101 U. S., 755), the court held that a withdrawal by the proper executive of the Government was sufficient to defeat a settlement for the purpose of pre-emption while the order was in force, "notwithstanding it was afterwards found that the law by reason of which this action was taken did not contemplate such a withdrawal."

Whether this particular tract of land is or will be required or used in the construction of irrigation works is a question to be determined by the Secretary of the Interior and until he has reached a determination of that question, the act of June 17, 1902, authorizes him to withhold the land from appropriation and disposition. It is a general rule well supported by both the law and good administration that no rights are obtained by an attempt to settle or file upon lands at the time embraced in a reservation or withdrawal made by or under proper authority.

Your decision in rejecting the homestead application to enter is accordingly hereby affirmed.

**SCHOOL LANDS—INDEMNITY—SWAMP GRANT—SCHOOL SECTIONS IN
EVERGLADES.**

STATE OF FLORIDA.

The swamp-land grant of September 28, 1850, did not supersede the school-land grant made to the State of Florida by the act of March 3, 1845, and the State is not entitled to indemnity for school sections within the Everglades, on the ground that they were lost to the school grant by reason of the swamp grant, such sections passing to the State under the school grant.

*First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) Land Office, December 15, 1909. (S. W. W.)*

This case is before the Department upon the appeal of the State of Florida from your office decision of May 7, 1909, addressed to Mr. B. F. Hampton, State selecting agent for school lands, denying his application for the protraction of the lines of survey over the area in said State known as the "Everglades," for the purpose of ascertaining the number of townships contained therein, to the end that the State may select indemnity for the school sections which would be found if the land were surveyed.

It appears that all of the lands constituting the Everglades were approved to the State of Florida February 13, 1897, in swamp list No. 87, which approval, however, was subsequently revoked, and on March 28, 1903, list No. 107, embracing the entire Everglades, except sections 16, was approved, which latter list contained the following language: "There are eliminated and excepted from the above . . . all of what would be the school sections if the lands were surveyed;" and that patent issued in accordance with the latter list.

It is contended by the appellant that by the approval of February 13, 1897, *supra*, the Secretary of the Interior determined for all time the swampy character of the sections 16 embraced in the Everglades, and that such sections having been found by the Secretary of the Interior to be swamp land within the meaning of the act of September 28, 1850 (9 Stat., 519), they were granted to the State by that act, which grant constitutes a disposition of said land within the meaning of the act of March 3, 1845 (5 Stat., 788), and the act of February 28, 1891 (26 Stat., 796), which acts make provision for the grant of sections 16 to the State of Florida for school purposes, and the selection of indemnity where such sections have been otherwise disposed of.

It is further contended in support of the appeal that the school sections in the Everglades, which has been held to be a swamp impracticable of survey, are, by reason thereof, lost to the State by natural causes, within the meaning of section 2275 of the Revised Statutes, as amended by the said act of February 28, 1891, and, therefore, that whether the State is entitled to indemnity for the school sections because of the fact that they were granted to the State by the swamp land act of 1850 or not, the State is entitled to indemnity because said sections are lost from natural causes.

It is held in your office decision under consideration, that protractions may be made under authority of section 2275 of the Revised Statutes, as amended by the act of 1891, *supra*, only in those cases where the lands involved are included within "Indian, military, or

other reservation," and as the Everglades does not constitute a reservation, there is no authority of law for the protraction of the lines of survey across the same. Moreover, your office, relying upon the decisions in the cases of State of Minnesota (32 L. D., 325), and State of Louisiana (30 L. D., 276), holds that Congress, by the act of 1845, granted the school sections to the State, and that that grant was not defeated or impaired by the later grant of swamp lands under the act of 1850.

Congress, by the act of March 3, 1845, *supra*, granted to the State of Florida "section numbered sixteen in every township, or other lands equivalent thereto, for the use of the inhabitants of such township for the support of public schools;" and the act of February 28, 1891, *supra*, providing for the selection of school indemnity by the public-land States, contains the following language:

And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States.

As contended by the State, this Department and the courts have uniformly held that the grant of school sections in place does not attach to any particular tract of land until the same is identified by survey. See *Heydenfeldt v. Daney Gold and Silver Mining Co.* (93 U. S., 634); *Minnesota v. Hitchcock* (185 U. S., 373); *Black Hills National Forest* (37 L. D., 469), and cases cited. That Congress, therefore, had the authority prior to the survey of any school section in Florida to make other disposition thereof can not be doubted, and the question to be determined is as to whether or not Congress, by making the swamp land grant in 1850, intended thereby to make such a disposition of school sections afterwards found upon survey to be swamp as to impair the school grant and to render it necessary and competent for the State to select indemnity therefor.

It is a well-established rule that after a tract of land has been appropriated to any special purpose, it is thereafter severed from the mass of public lands, and that no subsequent law, provision, or sale can be construed to embrace it or to operate upon it, although no reservation were made of it. It is true that while the grant made to the State of Florida by the act of 1845, for school purposes, attached to no specific sections 16 until they were surveyed, and that under the decisions of the courts and the Department it was competent for Congress to make other disposition of the school section prior to the survey, nevertheless, it must clearly appear that it was the intention of Congress to make some other disposition of the school section before the Department would be justified in holding that such was its intention.

It is maintained in the appeal that there was no reservation of section 16 for school purposes in favor of the State of Florida prior to the date of the act of 1845 making the grant thereof, and this seems to constitute the basis of the argument that by reason of the failure of Congress to make any reservation of the school section in the State of Florida, prior to its admission into the Union, the school grant to Florida differs from that made to the other States, and that for that reason this case is not controlled by the decisions relied upon by your office.

While no specific reservation of section 16 in the State of Florida is found in any act of Congress, it is nevertheless clear that as early as the days of the Continental Congress the idea prevailed of providing for schools by making grants of land for that purpose. This is shown by the ordinance of May 20, 1785, which provided that lot numbered sixteen of every township in the western territory should be reserved for the maintaining of public schools within such township. This is said to have been a reservation by the United States and advanced and established a principle which finally dedicated a proportionate part of all the public lands of the United States, with certain exceptions as to mineral, etc., to the cause of education by public schools. (See Public Domain, page 224.) That Congress had the same idea respecting Florida may be seen by reference to the following acts:

Section ten of the act of March 3, 1823 (3 Stat., 754), providing for the survey and disposal of the public lands in Florida, declared:

That, whenever a land office shall have been established in either of the districts aforesaid, and a register and receiver of public moneys appointed for the same, the President of the United States shall be, and he is hereby, authorized to take so much of the public lands, lying in such districts, as shall have been surveyed according to law, to be offered for sale, in the same manner and with the same reservations and exceptions, and on the same terms and conditions, in every respect as have been or may hereafter be, provided for the sale of the public lands of the United States.

Prior to the enactment of that statute the reservation of section 16 in the States previously admitted into the Union had been made. Section 4 of the act of April 22, 1826 (4 Stat., 154), entitled "An act giving the right of preemption in the purchase of lands to certain settlers in the States of Alabama, Mississippi, and the Territory of Florida," provided:

That any person or persons who have settled on and improved any of the lands in the said Territory, reserved for the use of schools, etc.

See also section one of the act of March 2, 1829 (4 Stat., 357), authorizing the establishment of the town on a portion of the "sixteenth section of the township and range aforesaid reserved by law

for the use of schools;" section six of the act of August 4, 1842 (5 Stat., 502), providing for the selection of indemnity where any settlement is made upon the sixteenth section prior to the survey of the same; and the act of June 15, 1844 (5 Stat., 666), providing for the selection of indemnity by the school authorities wherever the sixteenth sections, either in whole or in part, are included in private claims.

The acts of Congress to which reference is made above clearly indicate that it was the intention of Congress to reserve for the State of Florida, for common school purposes, the sixteenth section in every township, and, this being so, it is not reasonable to suppose that in making the subsequent grant of swamp lands to the State in 1850 Congress intended to convey to the State lands which it had previously declared should be granted to it for another purpose. As indicated above, that Congress could have made some other disposition of the school lands can not be doubted; but the Department is of the opinion that such was not the intention in this case.

In considering the school and swamp-land grants made to the State of California, Attorney-General Devens, in an opinion rendered March 4, 1878 (15 Ops., 454), used the following language:

It is to be observed that with all the other States to which both school and swamp lands have been granted by Congress, the school-land grants are prior in date to the swamp-land grants. By reason of priority of the former grants the school sections in these States where they happened to fall within a swamp passed to the State as school land, not as swamp; and I am not aware of the existence of any general provision of law under which such a State is entitled to indemnity for so much of the swamp land within its borders as has been previously granted thereto for school purposes.

The views expressed by the Attorney-General in the opinion cited accord with the practice which has uniformly obtained in this Department respecting those States to which the school grant was prior to the date of the swamp grant. To grant the relief sought in this case would be tantamount to holding that in every State to which Congress granted both school lands and swamp lands, the State acquired title under the latter grant to all of the school sections not surveyed at the date of that grant, and is therefore entitled to indemnity on account thereof by virtue of the school grant. This Department can not believe that such was the intention of Congress.

Respecting the contention of the State that the land in question is included in a swamp impracticable of survey, and is therefore lost to the State from natural causes, it is sufficient to say that the land is either swamp land or covered by a permanent body of water. If it is land at all it belongs to the State by virtue of the school grant, and if the townships contain no land but are entirely covered by a perma-

ment body of water, it follows that the State is not entitled to any indemnity. See the case of State of Idaho (37 L. D., 430), and the case of the State of Florida, decided by the Department March 11, 1909, involving an application to protract the lines of survey over Lake Okechobee.

For the reasons stated herein your office decision is affirmed.

**STATE SELECTION—"QUARTER SECTION" ASSIGNED AS BASE
TREATED AS AN ENTIRETY.**

STATE OF CALIFORNIA.

Where a technical quarter section is assigned as a whole to support a selection by a State of another technical quarter section, the base so assigned can only be treated as an entirety, and if defective in part must be considered defective *in toto*; and it can not be assumed that the State intended to assign the several 40-acre subdivisions of the base land to support the corresponding 40-acre subdivisions of the selected land.

Counsel for the State of California have no authority to designate bases to support school indemnity selections, such power resting solely in the officer of the State authorized to make selections in its behalf.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, December 17, 1909.* (S. W. W.)

This is the appeal of the State of California from your office decision of June 4, 1909, holding for cancellation its selection embraced in list No. 360, Stockton series, of the SW. $\frac{1}{4}$, Sec. 20, T. 2 N., R. 17 E., M. D. M., now in the Sacramento land district, California.

It appears from the record and your said decision, that on November 22, 1894, the State assigned as bases in support of selections embraced in San Francisco list No. 5153, 492.24 acres in Sec. 36, T. 8 S., R. 26 E.; that in list No. 5467, same series, filed October 20, 1897, the State designated 6.40 acres in said section 36, as part base for another selection.

It further appears that section 36, T. 8 S., R. 26 E., is included in the Sierra Forest Reserve created February 14, 1893, and contains 640 acres. Consequently, when the selection under consideration was examined in your office it was found that the State had previously used 498.64 acres of said section as bases for other selections, leaving only 141.36 acres, which was not sufficient to support the selection of 160 acres embraced in said list No. 360.

In your decision under consideration the register and receiver were further directed to advise the State that the base lands designated in said lists No. 5153 and 5467, San Francisco series, should be described by legal subdivisions, or parts thereof, with a view to the

proper adjustment of the State's right to indemnity for the remaining portion of said section 36.

The appeal assigns error in your decision in holding the selection No. 360 for cancellation *in toto* because of alleged insufficient base, when it is shown that the State was and is entitled to more than 120 acres of indemnity on account of said selection; in not holding that the State is at least entitled to 120 acres of the land selected and allowing it to relinquish forty acres of the selected land and retain the remaining 120 acres; and in not holding that the designation of the full quarter section in exchange for a full quarter section is, in effect, a designation of each forty-acre tract of the selected land in lieu of the corresponding forty-acre tract of base land.

The first and second questions raised by this appeal have heretofore been considered by the Department and it has been definitely settled that base defective in part is defective in whole, and that areas of selected tracts and their bases must be equal and the selections separate and distinct, so that action thereon may be taken separately. The selection in this case was of a technical quarter section, in support of which the NE. $\frac{1}{4}$ of a school section included in a forest reserve was assigned as base. Your office upon examining the selection found that the State had previously used 498.64 acres of the school section, and, therefore, the remaining portion unused was not sufficient to constitute valid base for the selected tract.

The third question raised in the appeal appears to be a new one. It is not believed that the Department has a right to assume that when a quarter section of land is assigned as base for the selection of another quarter section, the State intends to assign one of the forty-acre tracts of the base land in support of the corresponding forty-acre tract of the selected land. When a technical quarter section is assigned as a whole in support of a selection, it is and can be only considered as a whole, and if defective in part, under the rules it must be considered as defective *in toto*.

It is observed that counsel for the State have assumed to designate the legal subdivision of section 36, in T. 8 S., R. 26 E., out of which the 18.64 acres necessary to support the entire selection, shall be considered as used. It is not understood that counsel for the State have authority to take this action. Selections of school indemnity by the State of California are made by the surveyor-general, who is *ex officio* register of the State land office, and it is believed that he, and he alone, may designate bases in support of the various selections desired.

The matter considered, the action of your office is approved. However, in the absence of any intervening claim, it would seem that the State, by its proper officer, may assign valid base in support of the selection in question.

SOLDIERS' DECLARATORY STATEMENT—VERIFICATION—FILING BY MAIL.

DANIEL GARLAND.

A soldiers' declaratory statement transmitted to the local officers by mail has, when filed, the same effect as though filed in person.

Where a soldier selects the land and makes the declaratory statement in person in his own name, the prescribed form should be verified before some officer designated in the act of March 4, 1904.

Where the selection and declaratory statement are made by agent, the appropriate form should likewise be executed by the agent before some officer designated by that act, but the soldier's affidavit showing his qualifications, etc., may be executed before any officer having a seal and qualified to administer oaths generally, but not necessarily in the land district.

Paragraph 5 of circular of April 10, 1909, 37 L. D., 638, amended.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, December 21, 1909.* (J. H. T.)

April 3, 1909, the local officers of the Roseburg, Oregon, land office rejected the soldiers' declaratory statement transmitted to that office by mail by Mattie Carlson, agent for Daniel Garland, a soldier, for the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 32, T. 38 S., R. 2 E., W. M.

The said soldier executed his affidavit before a notary public in Boone County, Missouri, upon the usual blank form showing his qualifications, etc., and containing the appointment of the agent. The said agent's affidavit upon the accepted form was executed before a United States commissioner, apparently within the Roseburg land district. The filing was rejected because transmitted by mail and not filed at the local land office by the agent in person. Appeal was taken from the action of the local office to your office, and you have transmitted the papers to the Department for consideration and instruction.

You cite paragraph 5 of the circular of April 10, 1909 (37 L. D., 638), concerning the filing of such declaratory statement, which reads in part as follows:

The application to enter may be presented to the land office through the mails or otherwise, but the declaratory statement must be presented at the land office in person either by the soldier or sailor or by his agent, and can not be sent through the mails.

You recommend that the said circular be amended so as to allow such filings to be transmitted by mail.

Section 2309, United States Revised Statutes, provides that:

Every soldier, sailor, marine, officer, or other person coming within the provisions of section two thousand three hundred and four, may, as well by an agent as in person, enter upon such homestead by filing a declaratory statement, as in preemption cases; but such claimant in person shall within the time

prescribed make his actual entry, commence settlements and improvements on the same, and thereafter fulfill all the requirements of law.

The said circular is in accord with the practice which has heretofore obtained. See letter of April 14, 1874 (1 Copp's Land Owner, 20), and case of *Cullom v. Helmer et al.* (22 L. D., 392).

The regulations and decision rendered upon the question involved seem to have been based upon the theory that the reference "as in preemption cases," used in section 2309, Revised Statutes, required that a soldiers' declaratory statement made either in person or by agent must have been executed, as an affidavit, before the register or receiver of the land office in the land district wherein the land applied for was situated, following section 2262, United States Revised Statutes, which (prior to amendment) required a person applying to enter land under the preemption act to make oath before such officer to the statements therein directed. But a person desiring to file a preemption declaratory statement simply had to "file with the register of the proper district a written statement, describing the lands settled upon, and declaring his intention to claim the same under the preemption laws." See section 2264, United States Revised Statutes.

The former construction above indicated is not applicable at this time as the law relating to preemption cases was amended by the act of June 9, 1880 (21 Stat., 169), and was further amended, together with other laws, including the homestead law, by the acts of May 26, 1890 (26 Stat., 121), March 11, 1902 (32 Stat., 63), and March 4, 1904 (33 Stat., 59), so as to permit the necessary affidavits to be executed before officers other than the register or receiver. The last-mentioned act provides:

That hereafter all proofs, affidavits, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, preemption, timber-culture, desert-land, and timber and stone acts, may, in addition to those now authorized to take such affidavits, proofs, and oaths, be made before any United States commissioner or commissioner of the court exercising Federal jurisdiction in the Territory or before the judge or clerk of any court of record in the county, parish, or land district in which the lands are situated: *Provided*, That in case the affidavits, proofs, and oaths hereinbefore mentioned be taken out of the county in which the land is located the applicant must show by affidavit, satisfactory to the Commissioner of the General Land Office, that it was taken before the nearest or most accessible officer qualified to take said affidavits, proofs, and oaths in the land districts in which the lands applied for are located; but such showing by affidavit need not be made in making final proof if the proof be taken in the town or city where the newspaper is published in which the final proof notice is printed. The proof, affidavit, and oath, when so made and duly subscribed, or which may have heretofore been so made and duly subscribed, shall have the same force and effect as if made before the register and receiver, when transmitted to them with the fees and commissions allowed and required by law.

It clearly appears from the above that whatever affidavit is required of the person who files a soldiers' declaratory statement may be executed before any proper officer as designated by the said act of March 4, 1904, and no reason appears why it may not be transmitted to the local office by mail.

It is therefore directed that the present blank forms be continued; that where the soldier selects the land and makes the declaratory statement personally in his own name, the form shall be executed before some officer designated in said act of March 4, 1904; that if the selection and declaratory statement be made by agent, the form for that purpose shall be executed by the agent before some officer designated in the said act of March 4, 1904, and the soldier's affidavit showing his qualifications, etc., according to the present form, shall be executed before some officer having a seal and qualified to administer oaths generally, but not necessarily in the land district; and declaratory statements thus executed and transmitted by mail to the local land office for filing shall, when filed, have the same effect as if filed in person.

These instructions, however, are general in their nature and must not be construed as affecting any special regulations for openings of particular lands.

Paragraph 5 of circular of April 10, 1909 (37 L. D., 638), and any other instructions in conflict herewith are declared amended to conform hereto.

The papers in the case of Garland are returned herewith for appropriate action in accordance with the above instructions.

OPENING OF ROCKY-BOY INDIAN LANDS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 10, 1909.

REGISTER AND RECEIVER,
Glasgow, Montana.

SIRS: I herewith transmit a copy of a "Notice of Restoration of Public Lands to Entry and Settlement," approved by the Secretary December 10, 1909, whereby there is opened to settlement on March 1, 1910, and thereafter, and to both settlement and entry on March 31, 1910, the lands described below, but no rights can be acquired under any settlement under the homestead laws, made on any of these lands, between the date of this order and March 1, 1910, and no rights so claimed will be recognized by you; but all persons claiming under

bona fide settlements made prior to the date of this order or on and after March 1, 1910, and prior to March 31, 1910, will have a preferred right to make entry if qualified to do so, at any time within three months after March 31, 1910. [See supplemental instructions, below.]

Ts. 34 and 35 N., R. 48 E., in State of Montana.

Ts. 34 to 37 N., Rs. 52 to 59 E., both inclusive, in State of Montana.

That part of Ts. 34, 35 and 36 N., R. 59 E., lying within State of Montana.

That part of T. 33 N., R. 55 E., north and east of the Fort Peck Indian reservation in State of Montana.

That part of Ts. 26 to 33 N., Rs. 54 to 59 E., both inclusive, lying north of the Missouri River and east of the Fort Peck Indian reservation, in State of Montana.

In order to avoid confusion it is directed that the applications of all qualified persons present at your office at nine o'clock a. m. on March 31, 1910, seeking to make entry of these lands, be received and treated as presented at nine o'clock a. m., and if there be more than one application for the same tract, they will be considered as simultaneously presented and the right of entry for the tracts embraced in conflicting applications shall be accorded to the highest bidder for such privilege, only the conflicting applicants being allowed to bid therefor. After the disposition of applications presented by persons present at nine o'clock a. m., which should be proceeded with at once, all other applications, whether received by mail or presented in person, will be disposed of in the usual way, the time of actual presentation being duly noted upon the applications.

Applicants or entrymen will acquire no rights as against any *bona fide* qualified settler who has made such settlement in accordance with these instructions, and who applies to make entry within ninety days after March 31, 1910.

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved:

R. A. BALLINGER, *Secretary*.

OPENING OF ROCKY BOY INDIAN LANDS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., January 7, 1910.

REGISTER AND RECEIVER,

Glasgow, Montana.

GENTLEMEN: On December 10, 1909 (38 L. D., 359), the Secretary of the Interior approved instructions, addressed to you, relative to the opening to entry of certain reserved land therein described. Under

said instructions, the lands become subject to settlement on March 1, 1910, and thereafter, and to both settlement and entry on March 31, 1910.

Where entries within the lands to be opened have been canceled as the result of contest proceedings brought against the same, and the successful contestants awarded a preferred right of entry according to law, you will not allow such contestants to exercise such preference right prior to March 31, 1910, the date on which the lands to be opened become subject to entry. You will notify each of such contestants, by registered letter, prior to that date, such right can be exercised within the thirty days commencing March 31, 1910, and ending on April 29, 1910. No rights will be gained by settlement, on lands subject to such preference rights of entry, prior to April 30, 1910.

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved:

R. A. BALLINGER, *Secretary*.

ENLARGED HOMESTEAD—ACT OF FEBRUARY 19, 1909.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 14, 1909.

The Registers and Receivers, United States Land Offices, Colorado, Montana, Nevada, Oregon, Utah, Washington, Wyoming, Arizona, and New Mexico.

GENTLEMEN: The following instructions are issued for your guidance in the administration of the act of Congress, approved February 19, 1909, "to provide for an enlarged homestead" (35 Stat., 639), copy of which may be found at the end of these instructions:

HOMESTEAD ENTRIES FOR 320 ACRES—KIND OF LAND SUBJECT TO SUCH ENTRY.

1. The first section of the act provides for the making of homestead entry for an area of 320 acres, or less, of nonmineral, nontimbered, nonirrigable public land in the States of Colorado, Montana, Nevada, Oregon, Utah, Washington, Wyoming, and in the Territories of Arizona and New Mexico.

The term "nonirrigable land," as used in this act, is construed to mean land which, as a rule, lacks sufficient rainfall to produce agricultural crops without the necessity of resorting to unusual methods of cultivation, such as the system commonly known as "dry farm-

ing," and for which there is no known source of water supply from which such land may be successfully irrigated at a reasonable cost.

Therefore, lands containing merchantable timber, mineral lands, and lands within a reclamation project, or lands which may be irrigated at a reasonable cost from any known source of water supply, may not be entered under this act. Minor portions of a legal subdivision susceptible of irrigation from natural sources, as, for instance, a spring, will not exclude such subdivision from entry under this act, provided, however, that no one entry shall embrace in the aggregate more than 40 acres of such irrigable lands.

DESIGNATION OR CLASSIFICATION OF LANDS—APPLICATIONS TO ENTER.

2. From time to time lists designating the lands which are subject to entry under this act will be sent you, and immediately upon receipt of such lists you will note upon the tract books opposite the tracts so designated, "Designated, act February 19, 1909." Until such lists have been received in your office, no applications to enter should be received and no entries allowed under this act, but after the receipt of such lists it will be competent for you to dispose of applications for lands embraced therein under the provisions of this act, in like manner as other applications for public lands, without first submitting them to the General Land Office for consideration.

The fact that lands have been designated as subject to entry is not conclusive as to the character of such lands. Each entryman must furnish the affidavit required by section 2 of the act, and should it afterwards develop that the land is not of the character contemplated by the above act, the entry must be canceled or the area reduced, as the circumstances may warrant.

COMPACTNESS—FEES.

3. Lands entered under this act must be in a reasonably compact form, and in no event exceed $1\frac{1}{2}$ miles in length.

The act provides that the fees shall be the same as those now required to be paid under the homestead laws; therefore, while the fees may not in any one case exceed the maximum fee of \$10, required under the general homestead law, the commissions will be determined by the area of land embraced in the entry.

FORM OF APPLICATION.

4. Applications to enter must be submitted upon affidavit, Form No. 4-003, copy of which is annexed hereto.

The affidavit of applicant as to the character of the lands must be corroborated by two witnesses. It is not necessary that such witnesses be acquainted with the applicant, and if they are not so acquainted their affidavit should be modified accordingly.

ADDITIONAL ENTRIES.

5. Section 3 of the act provides that any homestead entryman of lands of the character described in the first section of the act, upon which entry final proof has not been made, may enter such other lands, subject to the provisions of this act, contiguous to the former entry, which shall not, together with the lands embraced in the original entry, exceed 320 acres, and that residence upon and cultivation of the original entry shall be accepted as equivalent to residence upon and cultivation of the additional entry.

This section contemplates that lands may, subsequent to entry, be classified or designated by the Secretary of the Interior as falling within the provisions of this act, and in such cases an entryman of such lands who had not at the time of the classification or designation of the lands made final proof may make such additional entry, provided he is otherwise qualified. Applicants for such additional entries must, of course, tender the proper fees and commissions and must make application and affidavit on the Form No. 4-004, attached hereto. Entrymen who made final proof on the original entries prior to the date of the act or prior to the classification or designation of the lands as coming within the provisions of the act are not entitled to make additional entries under this act.

FINAL PROOFS ON ORIGINAL AND ADDITIONAL ENTRIES—COMMUTATION NOT ALLOWED.

6. Final proofs must be made as in ordinary homestead cases, and in addition to the showing required of ordinary homestead entrymen it must be shown that at least one-eighth of the area embraced in each entry has been continuously cultivated to agricultural crops other than native grasses, beginning with the second year of the entry, and that at least one-fourth of the area embraced in the entry has been continuously cultivated to agricultural crops other than native grasses, beginning with the third year of the entry and continuing to date of final proof.

Final proof submitted on an additional entry must show that the area of such entry required by the act to be cultivated has been cultivated in accordance with such requirement; or that such part of the original entry as will, with the area cultivated in the additional entry, aggregate the required proportion of the combined entries, has been cultivated in the manner required by the act.

Proof must be made on the original entry within the statutory period of seven years from the date of the entry; and if it can not be shown at that time that the cultivation has been such as to satisfy the requirements of the act as to both entries it will be necessary to submit supplemental proof on the additional entry at the proper time.

But proof should be made at the same time to cover both entries in all cases where the residence and cultivation are such as to meet the requirements of the act.

Commutation of either original or additional entry, made under this act, is expressly forbidden.

RIGHT OF ENTRY.

7. Homestead entries under the provisions of section 2289 of the Revised Statutes, for 160 acres or less, may be made by qualified persons within the States and Territories named upon lands subject to such entry, whether such lands have been designated under the provisions of this act or not. But those who make entry under the provisions of this act can not afterwards make homestead entry under the provisions of the general homestead law, nor can an entryman who enters under the general homestead law lands designated as falling within the provisions of this act afterwards enter any lands under this act.

A person who has, since August 30, 1890, entered and acquired title to 320 acres of land under the agricultural-land laws (which is construed to mean the timber and stone, desert land, and homestead laws), is not entitled to make entry under this act; neither is a person who has acquired title to 160 acres under the general homestead law entitled to make another homestead entry under this act, unless he comes within the provisions of section 3 of the act providing for additional entries of contiguous lands, or unless entitled to the benefit of section 2 of the act of June 5, 1900 (31 Stat., 267), or section 2 of the act of May 22, 1902 (32 Stat., 203).

If, however, a person is a qualified entryman under the homestead laws of the United States, he may be allowed to enter 320 acres under this act, or such a less amount as when added to the lands previously entered, or held by him under the agricultural land laws shall not exceed in the aggregate 480 acres.

CONSTRUCTIVE RESIDENCE PERMITTED ON CERTAIN LANDS IN UTAH.

8. The sixth section of the act under consideration provides that not exceeding 2,000,000 acres of land in the State of Utah, which do not have upon them sufficient water suitable for domestic purposes as will render continuous residence upon such lands possible, may be designated by the Secretary of the Interior as subject to entry under the provisions of this act; with the exception, however, that entrymen of such lands will not be required to prove continuous residence thereon. The act provides in such cases that all entrymen must reside within such distance of the land entered as will enable them successfully to farm the same as required by the act; and no attempt will be

made at this time to determine how far from the land an entryman will be allowed to reside, as it is believed that a proper determination of that question will depend upon the circumstances of each case.

Applications to enter under this section of the act will not be received until lists designating or classifying the lands subject to entry thereunder have been filed and noted in the local land offices. Such lists will be from time to time furnished the registers and receivers, who will immediately upon their receipt note upon the tract books opposite the tract so listed the words "Designated, section 6, act February 19, 1909." Stamps for making the notations required by these instructions will be hereafter furnished the local officers. Applications under this section must be submitted upon Form 4-003, copy of which is annexed hereto.

FINAL PROOFS ON ENTRIES ALLOWED UNDER SECTION 6—RESIDENCE—COMMUTATION NOT ALLOWED.

9. The final proof under this section must be made as in ordinary homestead entries, except that proof of residence on the land will not be required, in lieu of which the entryman will be required to show that from the date of original entry until the time of making final proof he resided within such distance from said land as enabled him to successfully farm the same. Such proof must also show that not less than one-eighth of the entire area of the land entered was cultivated during the second year; not less than one-fourth during the third year; and not less than one-half during the fourth and fifth years after entry.

OFFICERS BEFORE WHOM APPLICATION AND PROOFS MAY BE MADE.

10. The act provides that any person applying to enter land under the provisions thereof, shall make and subscribe before the proper officer an affidavit, etc. The term "proper officer," as used herein, is held to mean any officer authorized to take affidavits or proof in homestead cases.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved, December 14, 1909.

R. A. BALLINGER,
Secretary.

[PUBLIC—No. 245.]

AN ACT To provide for an enlarged homestead.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who is a qualified entryman

under the homestead laws of the United States may enter, by legal subdivisions, under the provisions of this act, in the States of Colorado, Montana, Nevada, Oregon, Utah, Washington, and Wyoming, and the Territories of Arizona and New Mexico, three hundred and twenty acres, or less, of nonmineral, nonirrigable, unreserved and unappropriated surveyed public lands which do not contain merchantable timber, located in a reasonably compact body, and not over one and one-half miles in extreme length: *Provided*, That no lands shall be subject to entry under the provisions of this act until such lands shall have been designated by the Secretary of the Interior as not being, in his opinion, susceptible of successful irrigation at a reasonable cost from any known source of water supply.

SEC. 2. That any person applying to enter land under the provisions of this act shall make and subscribe before the proper officer an affidavit as required by section twenty-two hundred and ninety of the Revised Statutes, and in addition thereto shall make affidavit that the land sought to be entered is of the character described in section one of this act, and shall pay the fees now required to be paid under the homestead laws.

SEC. 3. That any homestead entryman of lands of the character herein described, upon which final proof has not been made, shall have the right to enter public lands, subject to the provisions of this act, contiguous to his former entry which shall not, together with the original entry, exceed three hundred and twenty acres, and residence upon and cultivation of the original entry shall be deemed as residence upon and cultivation of the additional entry.

SEC. 4. That at the time of making final proofs as provided in section twenty-two hundred and ninety-one of the Revised Statutes the entryman under this act shall, in addition to the proofs and affidavits required under the said section, prove by two credible witnesses that at least one-eighth of the area embraced in his entry was continuously cultivated to agricultural crops other than native grasses beginning with the second year of the entry, and that at least one-fourth of the area embraced in the entry was so continuously cultivated beginning with the third year of the entry.

SEC. 5. That nothing herein contained shall be held to affect the right of a qualified entryman to make homestead entry in the States named in section one of this act under the provisions of section twenty-two hundred and eighty-nine of the Revised Statutes, but no person who has made entry under this act shall be entitled to make homestead entry under the provisions of said section, and no entry made under this act shall be commuted.

SEC. 6. That whenever the Secretary of the Interior shall find that any tracts of land, in the State of Utah, subject to entry under this act, do not have upon them such a sufficient supply of water suitable for domestic purposes as would make continuous residence upon the lands possible, he may, in his discretion, designate such tracts of land, not to exceed in the aggregate two million acres, and thereafter they shall be subject to entry under this act without the necessity of residence: *Provided*, That in such event the entryman on any such entry shall in good faith cultivate not less than one-eighth of the entire area of the entry during the second year, one-fourth during the third year, and one-half during the fourth and fifth years after the date of such entry, and that after entry and until final proof the entryman shall reside within such distance of said land as will enable him successfully to farm the same as required by this section.

Approved, February 19, 1909. (35 Stat., 639.)

4-003.

[Form approved by the Secretary of the Interior March 25, 1900.]

DEPARTMENT OF THE INTERIOR.

HOMESTEAD ENTRY.

[Act February 19, 1909.]

U. S. Land Office, -----

No. ----

APPLICATION AND AFFIDAVIT.

I, ----- (give full Christian name) ----- (male or female), a resident of ----- (town, county, and State), do hereby apply to enter, under the act of February 19, 1909 (35 Stat., 639), the ----- section -----, township -----, range -----, ----- meridian, containing ----- acres, within the ----- land district; and I do solemnly swear that I am not the proprietor of more than 160 acres of land in any State or Territory; that I, ----- (applicant must state whether native born, naturalized, or has filed declaration of intention to become a citizen. If not native born, certified copy of naturalization or declaration of intention, as case may be, must be filed with this application), -----, citizen of the United States, and am ----- (state whether the head of a family, married or unmarried, or over twenty-one years of age, and if not over twenty-one applicant must set forth the facts which constitute him the head of a family); that my post-office address is -----; that this application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation; that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation, or syndicate in making this entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly made, and will not make, any agreement or contract, in any way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the title which I may acquire from the Government of the United States will inure in whole or in part to the benefit of any person except myself. I have not heretofore made any entry under the homestead, timber and stone, desert land, or preemption laws except ----- (here describe former entry or entries by section, township, range, land district, and number of entry; how perfected, or if not perfected state that fact); that I am well acquainted with the character of the land herein applied for and with each and every legal subdivision thereof, having personally examined same; that there is not to my knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, nor any deposit of coal, placer, cement, gravel, salt spring, or deposit of salt, nor other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially nonmineral land, and that my application therefor is not made for the purpose of fraudulently obtaining title to mineral land; that

the land is not occupied and improved by any Indian; that the lands applied for do not contain merchantable timber, and no timber except ----- (here fully describe amount and kind of timber, if any), and that it is not susceptible of successful irrigation at a reasonable cost from any known source of water supply, except the following areas: ----- (give the subdivisions and areas of the lands, if any, susceptible of irrigation).

(Sign here, with full Christian name.)

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. (See sec. 5392, R. S., over.)

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known, or has been satisfactorily identified before me by ----- (give full name and post-office address); that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me, at my office, in ----- (town), ----- (county and State), within the ----- land district, this ---- day of -----, 19--

(Official designation of officer.)

We, -----, of -----, and -----, of -----, do solemnly swear that we are well acquainted with the above-named affiant and the lands described, and personally know that the statements made by him relative to the character of the said lands are true.

I hereby certify that the foregoing affidavit was read to or by affiants in my presence before affiants affixed signatures thereto; that affiants are to me personally known (or have been satisfactorily identified before me by -----); and that said affidavit was duly subscribed to before me at -----, this ---- day of -----, 19--.

(Official designation of officer.)

United States land office at -----
-----, 19--

I hereby certify that the foregoing application is for surveyed land of the class which the applicant is legally entitled to enter under the act of February 19, 1909, and that there is no prior valid adverse right to the same; and has this day been allowed.

Register.

REVISED STATUTES OF THE UNITED STATES—TITLE LXX.—CRIMES.—CHAP. 4.

Sec. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by fine of not more than two thousand dollars, and by

imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See sec. 1750.)

NOTE.—In addition to the above penalty, every person who knowingly or willfully in anywise procures the making or presentation of any false or fraudulent affidavit pertaining to any matter within the jurisdiction of the Secretary of the Interior may be punished by fine or imprisonment.

4-004.

[Form approved by the Secretary of the Interior, March 25, 1909.]

DEPARTMENT OF THE INTERIOR.

APPLICATION AND AFFIDAVIT.

ADDITIONAL HOMESTEAD.

[Act of February 19, 1909.]

Application No. _____ Land office at _____

I, _____, of _____, do hereby apply to enter under section 3 of the act of February 19, 1909 (35 Stat., 639), the _____ of section _____, township _____, range _____ meridian, containing _____ acres, as additional to my homestead entry No. _____ made _____ at _____ land office for the _____ section _____, township _____, range _____ meridian.

I do solemnly swear that I am not the owner of more than one hundred and sixty acres in any State or Territory, exclusive of the land included in my original entry above described, and that this application is made for my exclusive benefit as an addition to my original homestead entry, and not directly or indirectly for the use or benefit of any other person or persons whomsoever; that this application is honestly and in good faith made for the purpose of actual settlement and cultivation; that I will faithfully and honestly endeavor to comply with all the requirements of law; and that I have not heretofore made an entry under the homestead, timber and stone, desert land, or preemption laws other than that above described, except _____ (here describe former entries, if any); that I am well acquainted with the character of the land herein applied for and each and every legal subdivision thereof, having passed over the same; that my personal knowledge of the land is such as to enable me to testify understandingly with regard thereto; that there is not to my knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal, cement, gravel, or other valuable mineral deposit; that the land contains no salt springs or deposits of salt in any form sufficient to render it valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of the land is worked for minerals during any part of the year by any person or persons, and that my application is not made for the purpose of fraudulently obtaining title to mineral lands; that the land is not occupied and improved by any Indian, and is unoccupied and unappropriated by any person claiming the same under the public land laws other than myself; that the land embraced in the original entry and the land now applied for do not contain merchantable timber, and no timber except

----- (here fully describe amount and kind of timber, if any), and that it is not susceptible of successful irrigation at a reasonable cost, from any known source of water supply, except the following areas: -----
(Give the subdivisions and areas of the lands, if any, susceptible of irrigation.)

(Sign here, with full Christian name.)

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. (See sec. 5392, R. S., below.)

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (or has been satisfactorily identified before me by ----- [give full name and post-office address]); that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me, at my office, in ----- (town), ----- (county and State), within the ----- land district, this ----- day of -----, 19--

-----,
(Official designation of officer.)

We, -----, of -----, and -----, of -----, do solemnly swear that we are well acquainted with the above-named affiant and the lands described, and personally know that the statements made by him relative to the character of the said lands are true.

-----,
-----,
I hereby certify that the foregoing affidavit was read to or by affiants in my presence before affiants affixed signatures thereto; that affiants are to me personally known (or have been satisfactorily identified before me by -----); and that said affidavit was duly subscribed to before me at -----, this ----- day of -----, 19--.

-----,
-----,
(Official designation of officer.)

United States Land Office at -----,
-----, 19--

I hereby certify that the foregoing application is for surveyed land of the class which the applicant is legally entitled to enter under the act of February 19, 1909, and that there is no prior valid adverse right to the same; and has this day been allowed.

-----,
Register.

REVISED STATUTES OF THE UNITED STATES—TITLE LXX, CRIMES, CHAP. 4.

SEC. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully, and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by fine of not more than two thousand dollars,

and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See sec. 1750.)

NOTE.—In addition to the above penalty, every person who knowingly or willfully in anywise procures the making or presentation of any false or fraudulent affidavit pertaining to any matter within the jurisdiction of the Secretary of the Interior may be punished by fine or imprisonment.

VALENTINE SCRIP—ADJUSTMENT OF LOCATION TO SURVEY—LOCATION UPON DOUBLE-MINIMUM LANDS.

GEORGE F. THORNTON.

In adjusting a Valentine-scrip location of unsurveyed lands to the "general system of United States land surveys," as required by the act of April 5, 1872, the location must be conformed to the actual lines of legal subdivisions as established by survey.

Double-minimum lands are subject to location with Valentine scrip only upon payment of the difference between the single and double-minimum price.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, January 7, 1910.* (E. F. B.)

By decision of June 17, 1909, appellants James A. Johnson and the Johnson Cattle Company were advised that if the scrip location made by George F. Thornton, upon unsurveyed double minimum lands in the Phoenix, Arizona, land office, with Valentine scrip, be adjusted to the public land surveys, and a payment of \$1.25 per acre is made, a certificate may be issued as the basis of a patent in the name of the "heirs of George F. Thornton." They were also advised that upon failure to make such adjustment and payment the location will be canceled.

Appellants contend that it is error to require them to adjust the location to any particular technical subdivision, and to require any additional payment for the land except the usual adjustment fee. These are the only issues presented by the appeal.

The land in question was located June 4, 1888, by George F. Thornton, of Williams, Arizona, with Valentine scrip E, No. 266, for 40 acres, which had been duly assigned to Thornton by Valentine. No assignment or transfer from Thornton appears with the record. The location was made of unsurveyed lands lying within the limits of a railroad grant and was described by metes and bounds. The location is shown by the township plat of survey to be embraced within the W. $\frac{1}{2}$ SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ SW. $\frac{1}{4}$ of said NE. $\frac{1}{4}$, Sec. 28, T. 2 N., R. 2 W., and was adjusted accordingly by the transferee of the location, thus embracing in the location parts of two smallest legal subdivisions.

This scrip was issued under authority of the act of April 5, 1872 (17 Stat., 649), which provided that the scrip shall be issued in legal subdivisions, authorizing the claimant to select an equal quantity of unoccupied and unappropriated public land "in tracts not less than the subdivisions provided for in the United States land laws, and, if unsurveyed when taken, to conform, when surveyed, to the general system of United States land surveys."

It is contended by appellant that the adjustment is for the lands originally located and is in square compact form which is conformable to the "general system of United States land surveys." But a mere adjustment of the location in rectangular form of an area not less than 40 acres is not a compliance with the act and does not fulfill its purpose and intent. The object in requiring every location to conform to the actual lines of legal subdivisions is to preserve the integrity of the legal subdivisions established by the general system of the public land surveys, thus avoiding the creation of noncontiguous fractions or remnants of legal subdivisions.

The other contention of appellants, that the act providing for the issuance of Valentine scrip does not limit the location of such scrip to single minimum lands, is also untenable.

Every statute providing for the disposal of public lands must be considered with reference to the general system of laws regulating the disposal of the public domain. At the time of the passage of the act of April 5, 1872, the price at which the public lands were offered for sale was \$1.25 per acre, "provided that the price to be paid for alternate reserved lands, along the line of railroads within the limits granted by any act of Congress, shall be \$2.50 per acre."

That provision was carried into the Revised Statutes as section 2357, and is part of the general system regulating the disposal of the public lands. Such being the general policy with respect to the public lands, every statute making a grant of them or providing for their disposal must be considered as having reference to lands valued at \$1.25 per acre, unless it is obvious, either from the express terms of the statute or by necessary implication, that it was the purpose of Congress to extend its operation to all public lands, irrespective of price.

In *United States v. Healey* (160 U. S., 136), the court, construing the act of March 3, 1877, providing for entries of desert lands, which fixed the price at \$1.25 per acre, held that as said act contained no words of repeal, it must be construed with reference to the general policy governing the price of public lands as contained in section 2357, Revised Statutes, and hence alternate sections of lands within railroad limits which had been raised in price to \$2.50 per acre could not be disposed of under the desert-land law at less than \$2.50 per

acre. The principle announced in that decision must control in the construction of the act of April 5, 1872. See also *United States v. Ingram* (172 U. S., 327).

Reference is made by appellants to the act of April 11, 1860 (12 Stat., 836), providing for the issuance of scrip to the executors of Robert Porterfield and its location on public lands "where the minimum price for the same shall not exceed \$1.25 per acre, to be selected and located in conformity with legal subdivisions" of the public land surveys.

The mere fact that the act restricts the location of such scrip to single minimum lands by express terms, does not imply that the purpose of the act of April 5, 1872, was to authorize the location of Valentine scrip on any public lands, irrespective of price, because of the omission of such express terms in the latter act. The act of April 11, 1860, expressed in positive terms what was necessarily implied in the act of April 5, 1872, under the principle announced in the case of *United States v. Healey*, above cited.

Your decision is affirmed.

CLASSIFICATION AND VALUATION OF COAL LANDS.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GEOLOGICAL SURVEY,
Washington, D. C., January 7, 1910.

THE HONORABLE,

THE SECRETARY OF THE INTERIOR,

SIR: I recommend the following addition to paragraph 7 of the regulations regarding the classification and valuation of coal lands, approved by you April 10, 1909 (37 L. D., 653):

Where a bed is over 15 feet thick, the normal value shall be placed only on 15 feet; the next 15 feet or part thereof shall be valued at 60 per cent of the normal; the next 15 feet or part thereof at 40 per cent of the normal; and the rest of the bed at 30 per cent of the normal.

The reason for this modification is that for mining purposes a bed less than 15 feet thick is worth more per foot than a bed of greater thickness. The addition proposed above results from considering a thick bed as a multiple bed.

Very respectfully,

GEO. OTIS SMITH, *Director.*

Approved, January 8, 1910:

R. A. BALLINGER, *Secretary.*

RECLAMATION WATER-RIGHT CHARGES—TRUCKEE-CARSON
PROJECT—FIRST INSTALLMENT.

EDWIN P. OSGOOD.

Where an entry within the Truckee-Carson reclamation project was made too late in the year 1907 to obtain any benefit by the use of water for the crop season of that year, the first instalment for water-right charges did not under the instructions of May 6, 1907, considered in connection with the instructions of August 5, 1904, become due until December 1, 1908.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, January 10, 1910.* (J. H. T.)

September 15, 1909 (not reported), the Department affirmed your office decision of June 5, 1909, holding for cancellation the homestead entry of Edwin P. Osgood, made November 21, 1907, for farm unit F, or the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and lot 7, Sec. 6, T. 18 N., R. 29 E., M. D. M., 77.18 acres, at the Carson City, Nevada, land office. Said action was taken for the reason that the entryman was considered to be in default as to two instalments for water right charges under the act of June 17, 1902 (32 Stat., 388). A motion for review has been filed.

Claimant urges that the first instalment did not become due until December 1, 1908, and that he was so advised by officers of the Reclamation Service.

You held that under departmental order of May 6, 1907, the first payment became due December 1, 1907, and the second payment December 1, 1908.

In the instructions dated August 5, 1904 (33 L. D., 158), concerning the entries under the irrigation act in the said project (Truckee-Carson), it was stated:

You will also cause notice to be given that the charges which shall be made per acre upon entries of said lands are estimated to be \$26.00 per acre, payable in ten annual instalments, and that payment of said instalments shall commence on the first day of December of the year in which the water has been delivered to the land during the month of April of that year.

On May 6, 1907, certain farm-unit plats were approved, embracing the land here involved, and fixing the building charge at \$22.00 per acre, and further instructions were issued relative to the payments for operation and maintenance, and also for the cost of construction. Therein it was stated:

The operation and maintenance charges for the irrigation season of 1907, and until further notice, will be 40 cents per acre of irrigable land. The first instalment of said charges for all irrigable areas shown on these plats, whether or not water-right application is made therefor, or water is used thereon, shall be due and payable on or before December 1, 1907, at the local land office at Carson City, Nevada, the total payment for 1907 being not less than \$2.60 per acre. The building charge for subsequent years shall be due and payable at the same

place on or before December 1, and the operation and maintenance charge shall become due as announced by the Secretary of the Interior each year.

November 1, 1907, further instructions were issued relative to the payment of the instalments and fixing the construction charge at \$30.00 per acre for entries made after January 1, 1908, and requiring the first payment to be made at the time of entry.

It is clear that the instructions of November 1, 1907, have no application in this case as the entry was made prior to January 1, 1908. If the instructions of May 6, 1907, *supra*, were construed as requiring payment on December 1, 1907, by all persons making entry before that date irrespective of the date when the entry was made, it would be manifestly unfair because it would require the payment of the operation and maintenance charge for that irrigation season even though the party had made entry at a time too late to obtain any benefit by the use of water for that season. Osgood made entry November 21, 1907, which is clearly after the expiration of the irrigation and crop season for that year. A more reasonable interpretation of the said instructions would be given by considering same in connection with said instructions of August 5, 1904, which clearly contemplated payment of the first instalment after one irrigation season.

It is therefore held that the first payment by Osgood became due December 1, 1908, and the action against his entry was prematurely taken. Departmental decision of September 15, 1909, is hereby recalled and vacated and your decision of June 5, 1909, is reversed.

**SOLDIERS' ADDITIONAL-ASSIGNEE-POWER OF ATTORNEY-
NOTICE OF CLAIM.**

JEWETT W. ADAMS.

Where a soldier entitled to an additional right executed a double power of attorney, to locate and sell the right, at a time when the assignability of such rights was not recognized by the land department, and subsequently himself exercised the right, he thereby exhausted the same, and the land department has no power to permit further entry based upon such right by one claiming under the double power of attorney.

When the land department, for administrative convenience, took action amounting to a recognition of double powers of attorney as equitable assignments of soldiers' additional rights, it did not thereby undertake, and is not bound, to search its past and closed records to ascertain who may be entitled to claim as equitable assignees by reason of powers latent in the records disposed of and closed, and can not be charged with notice of such claims.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, January 12, 1910.* (J. R. W.)

Jewett W. Adams appealed from your decisions of March 25, 1909, and October 20, 1908, rejecting his application as assignee of William H. Eaton, under section 2307 of the Revised Statutes, to enter W. $\frac{1}{4}$

SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 30, T. 19 N., R. 65 E., M. D. M., Carson City, Nevada.

Eaton rendered military service in Company F, 8th Regiment, Missouri S. M. Cav., from March 1, 1862, to his honorable discharge, at a date not shown by the record here, but, for purposes of this decision, assumed to be more than ninety days. January 27, 1872, he made homestead entry 9029, at Boonville, Missouri, for NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 5, T. 39 N., R. 22 W., forty acres; canceled for abandonment, October 27, 1879. The entry was reinstated November 21, 1885, and was patented May 28, 1888.

June 26, 1875, before cancellation of the original entry, Eaton gave power of attorney to Charles D. Gilmore, in effect a conveyance of Eaton's additional right. October 1, 1875, entry in name of Eaton was made at Susanville, California, for SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 26, T. 27 N., R. 6 E., M. D. M., 120 acres, canceled September 28, 1885, because the original entry was canceled for abandonment. Such action was erroneous, but was in accordance with the practice of that time. The Sierra Lumber Company, transferee of Eaton's additional entry, moved for reinstatement of the entry, which was denied March 29, 1901.

June 23, 1888, after cancellation of Eaton's additional entry, Susanville, Eaton applied at Las Cruces, New Mexico, to make additional entry under section 2, act of June 8, 1872 (17 Stat., 333), for E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 11, T. 24 S., R. 9 W., 120 acres, filing therewith his affidavit that he had not, directly or indirectly, made any sale or disposal of his right to make additional entry, except an agreement with one A. R. Jackson, which he repudiated, and this A. R. Jackson endorsed. His entry was allowed, final certificate issued to him on the same date, and that land was patented to him July 28, 1891.

December 5, 1906, Jewett W. Adams, at Carson City, Nevada, applied as assignee of William H. Eaton to enter the W. $\frac{1}{2}$ SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 30, T. 19 N., R. 65 E., M. D. M., claiming to own Eaton's right by virtue of the power of attorney to Gilmore, made, June 26, 1875, through assignment July 18, 1906, from N. P. Chipman to Frederick McReynolds, and assignment September 17, 1906, by McReynolds to Jewett W. Adams, the applicant. Chipman's claim to own and assign the right is based on a decree of the Supreme Court of the District of Columbia, not among the papers of the case, of date not shown, said to have been rendered in a proceeding for dissolution of the firm Chipman, Houser and Company, which decree is claimed to have adjudged the ownership of the Eaton additional right, as part of the assets of said firm, to be in said N. P. Chipman.

On these facts, your decision of October 20, 1908, held that when the land entered June 26, 1875, at Susanville, California, under

Eaton's power to Gilmore, was deeded to the Sierra Lumber Company, the claim of right, basis of the entry, passed by deed of the land to the Sierra Lumber Company, and rejected Adams's application because the right had been satisfied by the Las Cruces entry and because it did not appear that Chipman had title to or right to assign Eaton's claim of right. Adams filed motion for review and in its support, January 2, 1909, filed in your office what purports to be a copy of an assignment by the Sierra Lumber Company to N. P. Chipman, said to have been executed December 1, 1908. March 25, 1909, you denied the motion because the right was fully satisfied by patent of the full quantity of land on the Las Cruces entry.

It is assigned as error of your decision: (1) that your office had actual notice of facts sufficient to put it upon inquiry that Eaton had sold his right prior to the Las Cruces entry; (2) that Chipman was entitled to have, and has not had, his day in court; (3) in not taking notice from the record of titles of the State of California where the deed to the Sierra Lumber Company for the land in the Susanville entry was recorded.

There is no merit in such contentions. From September 28, 1885, when the Susanville entry was canceled, until 1901, when the Sierra Lumber Company asked its reinstatement, no one claimed to be owner of Eaton's right. In the meantime, the right was asserted by Eaton himself June 23, 1888, and was satisfied by patent of the full quantity of land to him, July 28, 1891. The assignability of such right was not recognized by the land department nor by the public generally until long after satisfaction of the right by patent on the Las Cruces entry. It was only by device of double powers of attorney to locate the right and to convey the land located in name of the soldier that they were trafficked in. In view of the land department and the public generally all rights of others than the original claimant himself were merely latent equities cognizable only by their assertion. It was not until May 18, 1896, when the court spoke in *Webster v. Luther* (163 U. S., 331), that any right of third parties as assignees was by the land department, or by the public generally, supposed to be possible or to exist. The papers in the Susanville entry, under which the Sierra Lumber Company claimed as transferee, were not on their face an assignment of right—merely a power to locate, and as a mere power was revocable. It was over twenty-one years after the Susanville entry that the right was recognized to be assignable and more than twenty-three years before such powers were recognized as amounting to an equitable assignment of the right itself, first recognized by the land department, for convenience of administration, February 12, 1898, in *C. W. Darling* (26 L. D., 192), but that rule, for administrative convenience merely, did not bind the land department retrospectively to search its past closed records,

or to take notice of and ascertain the present holders of such rights as equitable assignees by reason of such powers latent in records disposed of and closed, lying in crypts in its closed files; nor could it resurrect and give a new life to a right then seven years before fully satisfied according to the regular rule and practice of the land department.

If Eaton's power to Gilmore was ever intended to be more than a mere power, it was so only by equitable implication from an unexpressed intent of the parties made twenty-three years before any such effect was by the land department recognized for convenience of administration and more than twenty-one years before the decision in *Webster v. Luther*, *supra*. Many such powers lying in disposed of cases in crypts of the General Land Office were never claimed to be more than mere powers, obtained on promise to pay the consideration if and as soon as patent issued on the entry to be made under them, never paid in fact, and abandoned if patent did not issue.

The case here is within the principle of the decision in *C. L. Hood* (34 L. D., 610, 611-613); *Anna R. Kean* (35 L. D., 87); *Andrew M. Turner* (34 L. D., 606); *Marvin Hughitt* (33 L. D., 544), and is essentially like *Frederick W. McReynolds*, assignee of *William A. Cornelius*, of August 8, 1908 (unreported). The right having been once satisfied, the executive power in respect to it is exhausted. There is no power of the executive to make another grant of land upon such right.

Your decision is affirmed.

NORTHERN PACIFIC INDEMNITY SELECTION—HOMESTEAD APPLICATION.

VOLD v. NORTHERN PACIFIC RY. CO.

The Northern Pacific Railway Company is the lawful successor in interest to the land-grant rights of the Northern Pacific Railroad Company.

The company is not restricted, in making indemnity selections, to land on the same side of the line of road as the land lost to the grant and assigned as base for the selection.

Where, at the date of selection by the company the land is free from any adverse claim and is otherwise subject to selection, the selection and claim of the company thereunder can not be defeated by any attempted initiation of rights between the date of selection and the approval thereof by the Secretary of the Interior in the regular course of business.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, January 12, 1910.* (S. W. W.)

This is the appeal of Oluf Vold from your office decision of July 9, 1909, affirming the action of the local office rejecting his homestead application for the NW. $\frac{1}{4}$, Sec. 3, T. 53 N., R. 10 W., Duluth, Minnesota, land district.

It appears from the record and your said decision that the tract in question was selected by the Northern Pacific Railroad Company as second indemnity per list No. 16, on November 9, 1883; that re-arranged list was filed April 10, 1893; that said selection was canceled by your office letter of April 7, 1897, for the reason that the land lay east of Duluth, which point was then held by the Department to constitute the eastern terminus of the grant. The cancellation was afterwards rescinded and the selection restored by your office letter of June 12, 1900, in view of the decision of the Supreme Court published in 177 U. S., 435, which held that the grant extended to Ashland, Wisconsin. It further appears that on December 16, 1904, Michael J. Griffith made timber and stone application for said tract of land, which was rejected by the local office December 17, for reason of conflict with the company's selection, and on December 19, 1904, Oluf Vold made homestead application for said tract, which was also rejected. Both parties appealed to your office, where the decision under consideration was rendered, in which it was held that the base assigned for the selection was valid and that the applications of Griffith and Vold were therefore properly rejected. As above stated, Vold's appeal brings the case before the Department.

The appellant maintains that no legal selection was ever made by the Northern Pacific Railway Company and no grant of land was ever made by the United States to that company; that it was error to reject the homestead application because of the alleged selection of the Northern Pacific Railroad Company, it being claimed that no selection of lands by said company or any other company, as indemnity, is a bar to the allowance of a homestead application until such selection is approved by this Department; and that it was error to hold that the selection of the Northern Pacific company was a valid selection because, it is urged, the selection is too remote from the land claimed to have been lost by the company, and is on the opposite side of the line of road whereon the lost land is situated.

All the questions raised by this appeal have been heretofore considered by the Department and decided against appellant's contention. It has already been determined that the Northern Pacific Railway Company is the legal successor of the Northern Pacific Railroad Company (*Jones v. Northern Pacific Railway Co.*, 34 L. D., 105); that the Northern Pacific Railway Company is not restricted in making indemnity selections to land on the same side of the road as that on which the base land lies (*Northern Pacific Railway Co. v. Santa Fe Pacific R. R. Co.*, 36 L. D., 368); that where at the date of the selection of the tract of land by the railroad company it is free from any adverse claim and is otherwise subject to selection, the selection and claim of the company under its selection can not be defeated by any attempted initiation of rights between the date of selection and the

approval thereof by the Secretary of the Interior in the regular course of business. (Ferguson *et al.* v. Northern Pacific Railway Co., 37 L. D., 260.)

It is therefore held that there is no merit in the appeal and the action of your office is affirmed.

APPLICATION—ELIMINATION OF TRACT—AMENDMENT—CONFLICTING SELECTION.

STATE OF OREGON v. NILSEN.

The elimination of one of the tracts embraced in an application to enter does not constitute an amendment thereof or render it subject to a conflicting State selection filed subsequent to the application but prior to the elimination.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, January 13, 1910.* (S. W. W.)

This is the appeal of the State of Oregon from your office decision of August 3, 1909, affirming the action of the local office rejecting the State's application to select lots 6, 7 and 8, and SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 23, T. 16 S., R. 4 E., and awarding said land to Phebe Nilsen under her timber-land application therefor.

It appears from the record and your said letter that on February 19, 1900, Blanche Edwards made homestead entry No. 9734, for said tracts, and also the NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of said section 23; that on May 22, 1907, Peder Orphus filed an affidavit of contest against said entry; that on June 12, following the filing of the affidavit of contest, Phebe Nilsen presented the relinquishment of the Edwards entry, and at the same time her timber and stone application for the tracts previously embraced in said homestead entry, which application was suspended and Orphus notified on June 13, 1907, of said relinquishment and of his thirty days' preference right to enter the land.

It further appears that on July 12, 1907, Orphus filed soldiers' additional homestead application for the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ of said section 23 and the State of Oregon filed school land indemnity application for lots 6, 7 and 8 and SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, which school land application was suspended because of Nilsen's prior application under the timber and stone act; that on May 14, 1908, Nilsen eliminated the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, the tract applied for by Orphus, from her application, and requested that it be accepted as to the remaining tracts; that accordingly notice was published on her application, and on the day set for the making of the proof, September 12, 1909, she appeared with her witnesses to submit the same, at which time the State of Oregon appeared by its authorized attorneys and protested against the proof, producing

witnesses by whom it was sought to prove that the land was not timber land as contemplated by the timber and stone act; that the timber-land applicant had not examined the tract prior to making application and proof therefor, as required by the regulations.

It was contended, furthermore, in behalf of the State that the relinquishment by Nilsen of the tract entered by Orphus constituted an amendment of her application, and that her application as thus amended was subsequent to the filing of the State's list.

From the testimony submitted in this case the local office and your office decided the two questions of fact involved, namely, the character of the land and whether or not the applicant inspected the same prior to making application and proof therefor, in favor of the timber-land applicant, and as the Department is not disposed to disturb the concurrent findings of your office and the local office there remains to be considered the legal question as to whether or not the relinquishment or elimination by Nilsen of the tract entered by Orphus, constituted such an amendment of the timber-land application as to make it subsequent in point of time to the State's lieu land selection, which was presented at the same time that Orphus made his soldiers' additional homestead entry.

It appears that the State filed the school selection in the interest of Orphus with whom contract has been made for the sale of the land. It is well settled, however, that the preference right of entry acquired by a successful contestant is personal and can not be transferred so as to be exercised by the transferee as against another party who has presented a prior application.

Upon consideration it must be held that the elimination of one of the tracts from the timber and stone application by Nilsen did not constitute an amendment thereof within the usual meaning of that term, and the action of your office is accordingly affirmed.

**SECOND HOMESTEAD-ABANDONED ENTRY-QUALIFICATION-ACT
FEBRUARY 8, 1908.**

LIBERTY v. MOYER.

A homesteader who had actually abandoned his entry, and which was subject to cancellation on the ground of abandonment, at the date of the act of February 8, 1908, comes within the provisions of that act, and is not disqualified as a settler with a view to second entry thereunder by reason of the fact that his abandoned entry is still of record.

Where at the time of the initiation of a contest the contestant has a relinquishment of the entry in his possession or under his control, it can not in any sense, upon being subsequently filed, be treated as a result of the contest, so as to give the contestant any rights as against a settler on the land.

*First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) Land Office, January 13, 1910. (C. J. G.)*

An appeal has been filed by defendant in the case of Patrick Liberty *v.* Ira S. Moyer from the decision of your office of July 6, 1909, holding for cancellation his homestead entry on account of the superior rights of plaintiff for the N. $\frac{1}{2}$ NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 12, T. 140 N., R. 105 W., Dickinson, North Dakota.

March 17, 1906, one George Nelson made homestead entry for the land in controversy. October 1, 1908, Ira S. Moyer filed Nelson's relinquishment and was allowed to make homestead entry for said land. October 6, 1908, Patrick Liberty filed affidavit of contest against Moyer's entry, charging collusion and speculation on the part of Moyer and claiming prior settlement in his own behalf.

A hearing was ordered by your office and had December 16, 1908, before the local officers, whereat both parties appeared and submitted testimony. Said officers rendered decision February 6, 1909, finding from the testimony:

That the defendant contracted for the purchase of the relinquishment of George Nelson to the tract in question on or about the first day of April, 1908. He at that time left his check for \$500 in payment therefor, with the Inter State Bank of Sentinel Butte, North Dakota. The relinquishment was to be delivered upon the check being honored. Said check was honored and the relinquishment delivered April 30, 1908.

April 17, 1908, Ira S. Moyer filed affidavit of contest against the entry of George Nelson, which was rejected by the local officers July 6, 1908, and on July 8, 1908, Patrick Liberty also filed affidavit of contest against Nelson's entry, which was held subject to final action on Moyer's contest. The latter appealed, August 13, 1908, from the rejection by the local officers of his contest against Nelson's entry, and their action was affirmed by your office October 5, 1908. In the meantime, as hereinbefore stated, Moyer filed Nelson's relinquishment, October 1, 1908, and was allowed to make homestead entry on that date. The case of Moyer *v.* Nelson was closed by your office February 26, 1909.

As to Liberty's settlement, the local officers found:

The testimony shows that the plaintiff went upon the land in question in the early part of June, 1908, and resided there continuously until about the first of October. During that time he put into cultivation about three acres and made certain other improvements.

They further held:

We find that the relinquishment of George Nelson, filed Oct. 1, 1908, was not induced by the contest of Ira S. Moyer filed April 17, 1908, and that any rights which he may have in this case are those obtained through the fact that he was the first qualified applicant to apply for entry for said land after the cancellation of the entry of George Nelson.

In the face of an adverse claim of prior settlement under the act of May 14, 1880, said entry would not hold, provided that the adverse claimant came within the provisions of said act.

It appears that Patrick Liberty made homestead entry June 24, 1907, for the W. $\frac{1}{2}$ SW. $\frac{1}{4}$ and W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 12, T. 136 N., R. 104 W., Dickinson, North Dakota, which was still of record at the date of the local officers' decision in this case. From this fact, said officers concluded that Liberty was disqualified from making entry at the time of his settlement on the land in controversy, and therefore that Moyer was the first qualified applicant for said land after the cancellation of Nelson's entry, upon his relinquishment filed October 1, 1908. They accordingly recommended that Liberty's contest be dismissed, and that Moyer's entry be held intact. It was held by your office:

The testimony shows clearly that the relinquishment by Nelson was not due to the contest by Moyer; that on or about the time of the initiation of said contest Moyer had, or at least controlled, the relinquishment by Nelson; that contestant went upon the land in the early part of June, 1908, and resided thereon continuously ever since with his family, and that his improvements consist of a dwelling house, barn, well, and some breaking.

It is manifest therefrom that contestant has the superior right in and to the land as against Moyer by reason of his contest against Nelson's entry and by reason of his settlement, improvement, and cultivation of the land, provided it be shown that he is qualified under the homestead law to make entry.

Your office held that under all the facts of the case, Liberty was a qualified entryman at date of his settlement on the land in controversy, notwithstanding his entry of June 24, 1907, was still of record at that time, reference being made to the act of February 8, 1908 (35 Stat., 6), and the cases of *Smith et al. v. Taylor* (23 L. D., 440), and *Moritz v. Hinz* (on review, 37 L. D., 382).

The determination of this case turns solely upon the question of Liberty's qualification as a second homestead entryman, as under all the facts disclosed by the record the relinquishment of Nelson can in no reasonable view be treated as the result of Moyer's contest; nor is there any doubt that the acts performed by Liberty under his settlement claim were sufficient to defeat Moyer's subsequent entry. The act of February 8, 1908, *supra*, provides:

That any person who, prior to the passage of this act, has made entry under the homestead laws, but from any cause has lost forfeited or abandoned the same, shall be entitled to the benefits of the homestead law as though such former entry had not been made, and any person applying for a second homestead under this act shall furnish the description and date of his former entry: *Provided*, That the provisions of this act shall not apply to any person whose former entry was canceled for fraud, or who relinquished the former entry for a valuable consideration.

There is nothing in this act providing, or even necessarily implying, that in order to constitute abandonment an entry must actually be canceled of record. Actual abandonment of the land is entirely possible, even though an entry thereof still remains of record. The fact of an entry being of record does not of itself relieve an entryman from the charge and proof of abandonment. As to Liberty's entry of June 24, 1907, your office found:

That he made said entry in good faith; that he never attempted to sell his relinquishment thereof or tried to realize any gain therefrom; that he was acting under the advice of his attorney, who instructed him that the proper time to relinquish said entry would be when he made application to enter other lands; that the land covered by his said entry is uninhabitable and uncultivable, and that the object of the homestead law was defeated by reason of the character of the entry and entryman deprived of the benefits of the statutes through no fault of his, all of which stands uncontradicted.

The decision of the local officers was upon the purely technical ground that Liberty had an entry of record at the time he settled upon the land here in question, his disqualification necessarily resulting from that fact, no reference being made by them to his explanation for not formally relinquishing his entry. The undisputed testimony of Liberty is, that after making the entry of June 24, 1907, and upon going to the land covered thereby for the purpose of establishing residence, he discovered that an erroneous description had been given him of the land he intended to enter; that the land shown him was good for agricultural purposes, but it turned out to be not subject to entry; that the land he actually entered is rough and broken, and with the exception of a few acres is wholly unfit for agricultural purposes, being a part of the "bad lands;" that upon discovery of the mistake, he immediately abandoned said land, never established residence, and never made any improvements whatever thereon, and that the reason he never formally relinquished said entry is that his attorney advised him that the preferable way would be to file his relinquishment at the same time he applied to make second entry.

It is urged in the appeal here that this case is controlled by that of *Short v. Bowman* (35 L. D., 70). That case turned upon the finding that the entry involved was not actually abandoned. In the first place there was no question of error in describing the land in that case. "The evidence of actual abandonment prior to formal relinquishment is slight. He had not relinquished at the time he made settlement on another tract and his abandonment had existed for less than a week, a period far too short for the bringing of a contest on that ground. It appears further that he owned the improvements on the entered tract until after he executed his relinquishment, when he traded them to the person who made entry for the land,

which entry was in fact made on the same date the relinquishment was filed. Bowman, in his application for rehearing, asserted that Short raised a crop on the land he alleges he abandoned, and that he returned and harvested the same after he made settlement on the tract in dispute, and this allegation is not, in terms, denied by Short, though he does aver that the kaffir corn planted 'dried and shriveled up and was worthless.' Besides, Short executed a false affidavit as to having made a prior entry. "Only one natural presumption arises from such action and that is that at the time he executed the false affidavit he was attempting to conceal a fact which, if discovered, might defeat his right as a prior settler; and the belief that his former entry would, if known, prejudice his claim, tends to cast considerable doubt upon his later averment that he had totally abandoned his claim under his former entry at the time he made settlement on the land in dispute."

This case clearly comes more nearly within the principles announced in the cases cited by your office. The preponderance of the evidence shows that Liberty had abandoned all claim under his former entry. His said entry was subject to cancellation on the ground of such abandonment, and under all the circumstances it must be held that he was not disqualified as a settler claiming the right to make second entry under the act of February 8, 1908, by the fact that the first entry had not been canceled of record at the date of his settlement. *Walton et al. v. Monahan* (on review, 29 L. D., 108).

The decision of your office herein is affirmed.

NORTHERN PACIFIC ADJUSTMENT—SETTLEMENT CLAIM—ACT JULY 1, 1898.

GREEN v. NORTHERN PACIFIC RY. CO.

One who settled upon a tract of land but did not continue to reside thereon, and neither on January 1, 1898, nor at the date of the act of July 1, 1898, was claiming the land, but had apparently abandoned the same, has no such claim as is subject to adjustment under that act or the act of May 17, 1906, extending its provisions.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, January 15, 1910.* (S. W. W.)

This is the appeal of Thomas C. Green from your office decision of July 14, 1909, affirming the action of the local office rejecting his application to be allowed to relinquish, under the act of July 1, 1898 (30 Stat., 597, 620), the S. $\frac{1}{2}$ NW. $\frac{1}{4}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 13, T. 4 N., R. 2 E., Vancouver, Washington, land district, and to transfer his homestead claim thereto to other lands.

It appears from the record and your said decision that the land described is within the primary limits of the constructed main line of the Northern Pacific Railway Company from Portland to Tacoma, under the grant made by the joint resolution of May 31, 1870 (16 Stat., 378), and is situated opposite that portion of the line definitely located September 22, 1882; that it is also within the limits of the withdrawal on account of the line of said railway company under the grant of July 2, 1864 (13 Stat., 365), from Wallula to Portland, which was not constructed and the grant for which was declared forfeited by the act of September 29, 1890 (26 Stat., 496); that said tracts were listed by the company November 24, 1888, per list No. 19, and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, was patented May 27, 1895.

It further appears that on November 30, 1891, the local office forwarded the rejected homestead application of Green for said tracts, and the action of the local office was affirmed by your office July 11, 1894, for reason of conflict with the grant of the railroad company; that on March 27, 1896, the Department, on appeal, reversed the decision of your office under the ruling laid down in *Spaulding v. Northern Pacific Railroad Co.* (21 L. D., 57); that on May 29, 1896, the decision of the Department was promulgated and the company's listing canceled as to the N. $\frac{1}{2}$ SW. $\frac{1}{4}$, with a view to allowing Green to make homestead entry therefor. The record does not show that Green took any further action in the matter.

In accordance with a later decision the company's listing was reinstated July 11, 1906, as to the N. $\frac{1}{2}$ SW. $\frac{1}{4}$, and that tract was patented to the company September 23, 1907.

It appears from Green's affidavit filed in support of his application to be allowed to relinquish and transfer his claim to other lands, that he settled upon the land described above about the year 1891; that he lived on the land with his family fourteen months, when he found it necessary to let his family go to Lewisville on account of the illness of his daughter, and he maintained residence and improvements on the land until it was patented to the railway company in 1895, but he spent most of his time with his family; that his family remained in Lewisville about four years and seven months after which they moved to Portland, Oregon, and have resided there ever since; that in 1891 or 1892 he took stumps and stones off the land and prepared it for mowing, and in the latter year cleared three acres, built a barn twenty-four by thirty-six feet, the value of his improvements being about \$800. It further appears from Green's affidavit that he spent no time at all on the land in the year 1897, and that the only personal property which he had on the land in 1898 consisted of a plow, harrow, some household furniture and utensils, and a good carpenter's work bench.

Your office decision under consideration holds that the claim asserted to this land by Green does not bring it within the terms of the act of July 1, 1898, *supra*, and, as stated, his appeal brings the case before the Department.

It will be observed from what has been stated that Green, while he was upon the land in 1891, was not maintaining residence thereon either on January 1, or July 1, 1898, because long prior to that he had apparently abandoned the tract. The decision of this Department referred to in the case allowed him to make entry of eighty acres of the tract involved, and it appears that he did not avail himself of that privilege. The inference is plain therefore that he abandoned his claim to the land.

It is not believed that either the act of July 1, 1898, *supra*, or the act of May 17, 1906 (34 Stat., 197), extending the provisions of the act of 1898, contemplated the adjustment of a case such as this. The mere fact that a man had at one time settled upon the land but did not continue to reside thereon, is not sufficient to bring his case within the purview of the act. The act in terms makes it the duty of the Secretary of the Interior to ascertain from time to time and cause to be prepared and delivered to the company, lists of the tracts which have been purchased or settled upon or occupied, and which "are now claimed by said purchasers or occupants, their heirs or assigns." As stated by the Supreme Court in the case of *Humbird v. Avery* (195 U. S., 480), the act of 1898 manifestly had reference to conditions existing at the time of its passage. So far as this record discloses Green was not claiming the land either at the date of the passage of the act or on January 1, 1898, and it must be held therefore that he is not entitled to an adjudication of his claim thereunder, as requested.

Your office decision is affirmed.

MINING CLAIM—DISCOVERY—ADVERSE PROCEEDINGS—PROTEST.

RUPP v. HEIRS OF HEALEY ET AL.

Discovery is indispensable to the validity of a mining location and necessarily must precede or be coincident with the perfection thereof; and when questioned, raises an issue generally to be tried out in an adverse suit before the local courts of competent jurisdiction.

Where, however, by a protest it is charged that no discovery, within the limits of the claim, was made at or prior to the beginning of the period of notice of an application for patent, which, if true, would disclose the absence of a seasonable and essential basis for a judgment in favor of the applicant or the adverse claimant, the land department will take jurisdiction to determine that question, to the end that, should the charge be sustained, the patent application will be dismissed and the applicant remitted to the prosecution of patent proceedings anew, in order that due opportunity may be given for the litigation of the controverted questions properly cognizable before the local courts in adverse proceedings.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, January 18, 1910.* (E. B. C.)

Albert J. Rupp, who has filed a protest against application No. 4560 (Serial No. 0491) presented by John Healey *et al.*, for the Last Batch lode mining claim, survey No. 7071, Leadville, Colorado, land district, has appealed from your office decision of August 11, 1909, dismissing his protest.

The history of the case is substantially as follows: The Last Batch claim was located October 11, 1887, by John Healey and others, upon a claimed discovery made August 12 preceding. Without waiver of rights, but for the purpose of correcting description, an amended location was made May 21, 1891, based upon the same alleged discovery. Upon the latter location the mineral survey executed September 7, 1891, was based, and the mineral surveyor returned as improvements the discovery shaft, 8 x 4 x 65 feet deep in rock, timbered, and valued at \$780.

December 18, 1895, the application for patent to the Last Batch location, alleged to bear gold and silver, was filed and notice thereof was first published on the following day.

On January 13, 1896, upon a claimed discovery made January 10 preceding, Albert J. Rupp located the Canestota lode claim, overlapping and embracing substantially the northern 1,000 feet of the Last Batch location. The claimed discovery points upon the respective locations were not within the conflict area.

February 13, 1896, Rupp filed his adverse claim in the land office, and on March 13 following instituted his adverse suit. The trial resulted in a verdict for the applicants, but a new trial was granted and thereupon verdict and judgment was rendered in favor of the adverse claimant. Upon appeal to the Supreme Court of Colorado, this judgment, for error in improperly excluding offered evidence regarding the assay of an ore sample, claimed to have been taken from the dump of the Last Batch claim, was, December 3, 1900, reversed, and the cause remanded for a new trial. *Healey et al. v. Rupp* (28 Col., 102; 63 Pac., 319).

Upon the third trial judgment was again rendered in favor of the adverse claimant. Upon appeal to the Supreme Court this judgment was reversed July 2, 1906, and the case remanded for further proceedings (37 Col., 26; 86 Pac., 1015). In the opinion the following statements appear:

Prior to the last trial, the record of which is presented by this appeal, plaintiff, over the objection of defendants, was permitted to file a supplemental complaint, basing his right to the premises in controversy upon a discovery as of a date many years subsequent to the time of filing his adverse in the local land office. Prior to the filing of this supplemental complaint the plaintiff

filed an amended and additional location certificate, in which he claimed the premises in dispute by virtue of the discovery mentioned in his supplemental complaint.

In this litigation, as appears from the statements made in the opinions rendered by the Supreme Court, the discovery of mineral and the existence of a vein or lode in the discovery shaft of the Last Batch claim were controverted questions and at the last trial it seems that the jury found that there was no discovery on the Last Batch location.

December 15, 1908, upon motion of counsel for the applicants, the district court, where the adverse suit was then pending, dismissed the cause. On the same day the attorney-in-fact for Albert J. Rupp, the adverse claimant, and his corroborating witnesses executed the protest here in question, which was filed on the following day in the local office. Among other matters, it is therein alleged that the so-called Last Batch location is not a legally or validly located lode claim; that the application is a fraud upon the Government;—

and that the said applicants, or neither of them, has ever discovered, uncovered, or disclosed within the boundaries of the said so-called and pretended Last Batch lode mining claim any vein or lode of mineral in rock in place, or developed or disclosed therein any mineral or vein of mineral, as required by the laws of the United States . . . that at no time heretofore or now has there ever been any discovery of mineral made by the said claimants of the said Last Batch lode mining claim within the boundaries thereof, and that no discovery of mineral has been made such as would entitle them to locate the claimed or pretended Last Batch lode as a lode mining claim on the public mineral domain of the United States.

Protestant also sets forth generally the location of the Canestota lode claim, the subsequent discovery of a vein or lode therein on April 10, 1896, and the adverse proceedings above mentioned.

His two corroborating witnesses, among other things, alleged that—

they and each of them have been acquainted with the ground known as the so-called Last Batch mining claim for more than ten (10) years last past; that they, with others, were in what is known as the discovery shaft of the so-called Last Batch lode, and examined the same on or about the 30th day of December, 1902, and that there was not at that time uncovered, discovered, or disclosed therein any mineral in rock in place whatsoever, but that said shaft was wholly and entirely in wash and that the same had not penetrated any solid formation whatsoever . . . and that they are familiar with the ground within the surface boundaries of the said so-called Last Batch lode mining claim, and that there has not been any discovery of mineral made by the said Last Batch claimants, or either or any of them, within the boundaries of said claim.

December 18, 1908, the local officers fixed January 25, 1909, as the date for hearing upon the protest. On the day named, owing to the death of John Healey, the principal claimant for the Last Batch location, the case was continued without date.

In 1905, the application papers herein were called to your office, because of the apparent delay in the making of entry and there remained. In March, 1909, a certified copy of the order dismissing the adverse suit having been filed directly in your office, the papers were returned on March 29, 1909, to the local officers, with directions that the applicants be allowed sixty days in which to complete the proofs and make entry. April 9, 1909, the local officers reported as to the filing of the protest and their action thereon, and requested instructions whether to reject the protest, with right of appeal, or to proceed with a hearing. With their April returns they transmitted all the papers in the case. They further reported that on April 9, 1909, applicants, having been notified, appeared and made payment of the purchase money, taking the receiver's receipt therefor, but that the register's final certificate was withheld.

The record being before your office, on August 11, 1909, the decision now complained of was rendered, which concludes as follows:

From a careful consideration of the protest I am constrained to hold that the allegation that the Last Batch lode claim was not legally located, which allegation is based upon an examination of the discovery shaft many years after the application was filed, while it may show that work in the discovery shaft has been abandoned is not sufficient to warrant this office in ordering a hearing to determine whether at date of application there was sufficient discovery of mineral to justify the location of the land under the United States mining laws. Moreover, protestant has had full opportunity to prosecute his claim to the land before the courts and has failed to do so. The protest is accordingly dismissed.

On appeal the protestant contends that the allegations of fact contained in the protest are such that if established at a hearing they necessarily would defeat the application, and furthermore, that he could not prosecute his adverse suit successfully for the reason that the Supreme Court of Colorado in its last decision held that the judgment in his favor could not be sustained because the claimed discovery upon the Canestota lode was made after the filing of his adverse claim and after the institution of the adverse suit.

While the court did decide that the rights of an adverse claimant are limited to those existing at the time of the filing of his adverse, so that he is not entitled to urge a subsequent discovery on his location for the purpose of supporting an affirmative judgment in his favor, yet the court expressly stated that—

the prime purpose of such a suit is to determine, for the information of the officers of the land department, which, if either, of the parties thereto is entitled to be vested with the fee of the premises in dispute by purchase from the Government.

With this statement made in the opinion and subsequently reiterated therein, it might be inferred (unless, as was suggested by counsel for the protestant, the state of the pleadings was such as to

preclude the plaintiff from being again heard before the trial court) that Rupp by prosecuting his suit to a final determination upon the merits, as was apparently contemplated by the Supreme Court in remanding the case for further proceedings in harmony with the views expressed in the decision, would, upon showing no discovery to sustain the Last Batch location, have obtained a judgment declaring that neither party was entitled to the land in dispute, pursuant to the pending proceedings, such being the form of judgment contemplated by the act of March 3, 1881 (21 Stat., 505), which provides that when a jury finds that the title to the ground in controversy is not established in either party, judgment shall be rendered according to such verdict.

To the protestant's appeal the applicants have interposed a motion to dismiss, based substantially upon the ground that the protestant is without interest, he having failed in his adverse suit and therefore can not be heard before the land department. The allegation as to ownership of the conflicting Canestota location by the protestant is sufficient to warrant the Department in according to him the status of a party in interest, under the Rules of Practice. See case of *Opie et al. v. Auburn Co.* (29 L. D., 230). The motion to dismiss the appeal is therefore denied.

The question raised by the appellant is not free from difficulties. Discovery is generally an issue to be tried out in an adverse suit before the local courts of competent jurisdiction. Paragraph 53 of the mining regulations provides that a protest can not be made a means of preserving a surface conflict lost by failure to adverse or by the judgment in an adverse suit. The text writers on mining law have laid down the general proposition that a protest will not lie where the defect is properly the subject of an adverse claim. See *Lindley on Mines*, 2d Edition, Sec. 712; *Snyder on Mines*, Sec. 692, and *Costigan on Mining Laws*, pages 366 and 388. Of similar import are the following cases, which have received departmental consideration: *Mutual Mining and Milling Co. v. Currency Co.* (27 L. D., 191); *American Consolidated Co. v. DeWitt* (26 L. D., 580); *Gowdy et al. v. Kismet Co.* (22 L. D., 624), and *Hallett and Hamburg Lodes* (27 L. D., 104, 112).

But none of these authorities present the peculiar state of facts suggested by the present record, namely, no actual discovery by anyone upon the ground applied for until after the expiration of the period of publication. If it be true, as alleged, that the Last Batch claimants never made a discovery and that the only valid discovery disclosing the existence of mineral in the ground was made by the protestant April 10, 1896, after the expiration of the period of publication, it is clear that the applicant's Last Batch location, at the time of application and of publication of notice, was invalid. Discovery

is indispensable to the validity of a mining location and necessarily must precede or be coincident with the perfection thereof. The ultimate right to a patent must always rest upon the basis of a lawful location; and if the element of discovery be drawn in question so as to involve the right of possession as between rival claimants, the land department can not ignore an alleged absence of discovery by the applicant for patent in time to have enabled a court of competent jurisdiction, pursuant to an adverse claim and suit, to determine the respective rights of the parties.

The Canestota location was not perfected by discovery, if at all, until after the period of publication had expired and hence the claimant thereof could not successfully maintain his then pending adverse suit against the applicants, as the Supreme Court of Colorado has plainly pointed out in the decision last rendered. But the protestant has averred lack of discovery in the Last Batch location. Under the circumstances disclosed, the Department is of opinion that he should be heard on the allegations of the protest, for if it be true that there was no discovery prior to the date alleged, April 10, 1896, the applicants should be dismissed from the land department and remitted to the prosecution of patent proceedings anew, in order that due opportunity may be given for the litigation of any controverted questions properly cognizable before the local courts in adverse proceedings.

While the question of discovery is not one ordinarily presented before the land department, yet, under certain circumstances, such a question may be, and has been, fully investigated and determined therein.

In *Waterloo Mining Company v. Doe* (17 L. D., 111, 114), the protestant company charged that there had been no discovery within the limits of the claim, and that no vein or lode existed therein except that a vein, on the apex of which it had a location, dipped beneath the surface of the ground. The Department in passing upon his allegation stated:

When, as in the case at bar, patent is sought for a lode claim such valuable deposits are defined as "veins or lodes of quartz or other rock in place bearing gold, silver," . . . etc., and the "discovery" thereof within the limits of the claim is made a prerequisite to its location. Section 2320, R. S.

When, therefore, the protestant made its said charge of nondiscovery it of course charged a failure "to comply with the terms of this chapter." This charge having been specifically made and properly substantiated the protestant was entitled to an opportunity to prove it. Such opportunity has, however, been denied. You found said charge unimportant because the ground was shown by the deputy mineral surveyor's report to be properly subject to mineral entry. This was manifest error, for without discussing the merits of such conclusion, such report was at best simply a contradiction of protestant's charge. The issue so made up was one of fact that could not be properly determined upon the record before you, and it was also one which called for an order of hearing.

In the case of *Hughes v. Ochsner*, on review (27 L. D., 396), a group of mining claims were involved, situated in the immediate vicinity of the Last Batch claim; in fact, two of the locations there mentioned, the Salina and St. Jacobs, are largely in conflict with the location here involved. In that case the protestants charged that there had been no discovery by the applicants, or anyone for them, of any lode or vein in place bearing gold, silver, or any mineral whatever, and that a great portion of the premises described in the claimant's application was claimed adversely, and owned by the protestants. The Department there said:

The allegation that there has been no discoveries of any lodes or veins in place bearing gold, silver, or other mineral upon any of said locations, and the further allegation that five hundred dollars worth of labor has not been performed or improvements made for the development thereof are legitimate subjects of inquiry by the Government, in the present status of this case, because the existence of a valuable mineral bearing lode or vein and the expenditure of five hundred dollars in labor or improvements are both conditions to the patenting of land as a lode claim under the mining laws.

The *prima facie* showing made by the claimants in this behalf was sufficient to authorize the allowance of an entry, but the showing made by the protestants is such as to cause grave doubts whether the law has been complied with, either in the matter of discovery or the expenditure of five hundred dollars in labor and improvements. There has been no hearing in this case, no opportunity to cross-examine witnesses, and the Department is unable to intelligently decide these questions on the record before it.

It is therefore directed that a hearing be ordered herein, at which the inquiry will be confined to these two questions.

In the case of *Bunker Hill Company v. Shoshone Mining Company* (33 L. D., 142), protestants charged that neither the applicant company nor its grantors had ever made a legal discovery of any vein or lode of mineral having its top or apex inside the surface of its claims and that the discovery claimed was based upon the dip of a vein, the apex of which was owned by the protestants. The Department said:

It is the duty of the land department, except as to controversies committed to the courts by the statute, to determine before issuance of patent whether the applicant is entitled thereto. To entitle a person to a patent for mineral land, he must show, among other things, a valid location of the land under the mining laws. There is no authority for the issuance of a patent to a mineral claimant who has not a valid location. An invalid location can not be recognized as a basis for patent. If, prior to patent, the applicant's location is challenged as invalid, as is the case here, the matter must be investigated and the validity of the location determined or patent can not issue.

The Supreme Court in *Creede Mining Company v. Uinta Company* (196 U. S., 337, 345), concerning the Federal mining statute stated:

The whole scope of the chapter is the acquisition of title from the United States to mines and mineral lands, the discovery of mineral being, as stated, the initial fact. Without that no rights can be acquired.

The court then proceeds to quote with evident approval from Lindley on Mines, second edition, section 335, as follows:

Discovery in all ages and all countries has been regarded as conferring rights or claims to reward. Gamboa, who represented the general thought of his age on this subject, was of the opinion that the discoverer of mines was even more worthy of reward than the inventor of a useful art. Hence, in the mining laws of all civilized countries the greatest consideration for granting mines to individuals is *discovery*. "Rewards so bestowed," says Gamboa, "besides being a proper return for the labor and anxiety of the discoverers, have the further effect of stimulating others to search for veins and mines, on which the general prosperity of the state depends.

It is the opinion of the Department that the allegations of the protest are sufficiently definite to raise the question of nondiscovery and that entry and patent should not be allowed for the Last Batch location unless a seasonable and valid discovery be shown therein. This holding must not be construed as authorizing or inviting an adverse claimant to bring any question before the land department which he should litigate in an adverse suit. The hearing ordered below is for the purpose of enabling the Department to ascertain the state of facts existent at the time the pending application was filed, in order that the same may be properly acted upon and disposed of in accordance with law.

For the reasons above given the decision of your office is reversed and the case is remanded, with directions that a hearing be ordered for the purpose of ascertaining whether or not there was any lawful lode discovery made within the limits of the claimed ground of the Last Batch location at or prior to the date of the filing of the application for patent, namely, December 18, 1895; and if such discovery be not shown the application must be rejected.

**NOTICE OF PREFERENCE RIGHT—LAND SUBJECT TO HOMESTEAD
ENTRY—RELINQUISHMENT FOR CONSIDERATION—SECOND HOME-
STEAD.**

FINLEY v. NESS.

Where a successful contestant is notified of his preference right of entry by registered mail, and the notice is received by him, the preference-right period begins to run from that date, excluding the day notice was received. The fact that land is covered with valuable timber does not exclude it from entry under the homestead law, where of such character that it would be suitable for agricultural use if the timber were removed; but land of a character not adaptable to any agricultural use is not subject to homestead entry.

A homestead entryman who executes a relinquishment and places it in the hands of another, who disposes of it for a valuable consideration, is disqualified to make second entry under either the act of April 28, 1904, or the act of February 8, 1908, regardless of whether he actually received any part of the consideration for which it was sold.

First Assistant Secretary Pierce to the Commissioner of the General (F. W. C.) Land Office, January 18, 1910. (J. H. T.)

Ina Finley has appealed from your office decision of July 12, 1909, reversing the action of the local office of January 19, 1909, and allowing the application of Sjur P. Ness to make homestead entry for the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 24, T. 15 S., R. 7 W., W. M., Roseburg, Oregon, land district.

March 17, 1902, Dorr Stephens made homestead entry for said land, which was canceled by your office letter of December 18, 1907, upon the contest of Ness, the present applicant, and on January 6, 1908, Ness was notified by registered letter of his preference right of entry.

January 2, 1908, Ina Finley filed her timber and stone application for said land, which was suspended pending the exercise of the preference right credited to Ness.

January 6, 1908, Ingeborg Ness, mother of the present homestead applicant, filed her timber and stone application for the land, which was also suspended because of the preference right of Ness, and also the application of Finley. August 8, 1908, Ingeborg Ness withdrew her said application.

January 23, 1908, Sjur P. Ness filed his application under section 1 of the act of April 28, 1904 (33 Stat., 527), for a second homestead entry for said land, supported by his affidavit setting forth the reasons why he had been unable to comply with the law in the matter of his first homestead entry, and why he abandoned the same. His first homestead entry was made June 17, 1898, at Minot, North Dakota, and canceled on relinquishment April 28, 1900. March 3, 1908, Ina Finley filed her sworn corroborated protest against said application of Sjur P. Ness for second homestead entry, alleging, among other things:

First. That the said land is not agricultural land; that it is unfit for cultivation and is valuable chiefly for the timber thereon, having about eight million feet of merchantable timber thereon.

Second. That the said S. P. Ness has already exercised his right of entry under the homestead laws and derived a benefit therefrom.

Third. That said homestead application was not filed in good faith for the purpose of securing a home for the said S. P. Ness, but was filed for the purpose of defeating the said rights of this protestant.

Upon this protest a hearing was ordered by your office, and upon the testimony submitted the local officers recommended that the application of Ness be rejected.

Section 1 of the said act of April 28, 1904, reads as follows:

That any person who has heretofore made entry under the homestead laws, but who shall show to the satisfaction of the Commissioner of the General Land Office that he was unable to perfect the entry on account of some unavoidable complication of his personal or business affairs, or on account of an honest mistake as to the character of the land; that he made a bona fide effort to

comply with the homestead law and that he did not relinquish his entry or abandon his claim for a consideration, shall be entitled to the benefit of the homestead laws as though such former entry had not been made.

The act of February 8, 1908 (35 Stat., 6), provides as follows:

That any person who, prior to the passage of this act, has made entry under the homestead laws, but from any cause has lost, forfeited, or abandoned the same, shall be entitled to the benefits of the homestead law as though such former entry had not been made, and any person applying for a second homestead under this act shall furnish the description and date of his former entry: *Provided*, That the provisions of this act shall not apply to any person whose former entry was canceled for fraud, or who relinquished the former entry for a valuable consideration.

Considerable evidence was submitted upon the question of compliance with law by Ness in connection with his former entry, and also upon the question whether he received a valuable consideration for relinquishing the same. T. C. Barker, who resides near Bowbells, North Dakota, testified that he lived in the vicinity of the land embraced in the first entry of Ness; that he heard that the entry of Ness was contested, and that as he knew where he was, he wrote to Ness about it and that Ness stated that he could not come at that time and finally sent his relinquishment to Barker with instructions to fight the contest as long as possible and take what he could get, as it was impossible for Ness to come back to fight the contest; that the relinquishment was placed in his hands for sale, and that he sold the same for \$10.00 to A. W. Movius, \$5.00 in trade at the store and \$5.00 in cash; also that he had sold the relinquishment of a sister of Ness for \$5.00; that he sent \$5.00 to Ness.

It further appears by the record that Movius sold the relinquishment of Ness to one Stahl for \$250 and the entry was canceled, whereupon Stahl made homestead entry. It appears that said Movius was the attorney representing the contestant, and that the contest was dismissed at the time relinquishment was filed. Ness denies that he ever gave any instructions to fight the contest case or had any intention of fighting the same, or that he authorized Barker to sell the relinquishment. He says that he thought to favor Barker by sending the relinquishment to him in order to enable him to get a suitable person to enter the land as a neighbor. He denies receiving any money from Barker for his relinquishment, but says the \$5.00 received was for his sister's relinquishment of her entry for land in the same vicinity. Upon this question the local officers in part say:

It is true that he says he instructed Barker to file the relinquishment at the land office, but his testimony shows that he did not expect him to file it there immediately, but what he did in effect was to place the relinquishment in Barker's hands for such use as he might see fit to make of it. It appears that Barker saw fit to dispose of it to Movius for \$10.00, and thus enabled Movius to exact the sum of \$250.00 from Stahl, who was seeking a home upon the public

domain. In our opinion the testimony does not justify the finding that Ness received a money consideration for his relinquishment, but the statute requires that he shall not have received a valuable consideration. In our opinion the benefit to Barker was such a valuable consideration. In order to come within the statute it seems to us that Ness, when he had decided to relinquish the entry, should have sent the relinquishment to the land office, which would have been as easy for him as to have sent it to Barker, thus permitting the land to lapse at once into its original state and be subject to entry by the first qualified applicant. This he chose not to do, but to place the relinquishment in the hands of a third person, and permit it becoming the subject of speculation. He expressly says that he expected to benefit Barker by this course.

Testimony was given relative to the character of the land here involved, and the evidence upon that point is sufficiently and properly stated in the decision of the local officers as follows:

At the hearing the protestant introduced the testimony of three witnesses of creditable appearance, whose testimony is in no way impeached, to the effect that the land which claimant now proposes to enter for agricultural purposes, and which his mother in her application had stated is unfit for cultivation and chiefly valuable for its timber, is in fact of a steep mountainous character and heavily timbered, and does not contain to exceed one-half an acre that could be considered as suitable for cultivation, and that even this small fraction could not be cultivated until cleared of timber and brush. One of these witnesses estimates that the land carries nine million feet of saw timber, while another says it contains between eight and nine million feet. One of these witnesses, an experienced farmer, says that the soil is thin and poor and absolutely unfit for cultivation, even if cleared of the timber. Claimant seeks to meet this showing by his own unsupported testimony to the effect that a considerable portion of the land could be prepared for grazing purposes without great expense for clearing, and that his intention is to abandon his law practice, establish his home upon the land and engage in the dairy business.

One of the grounds upon which the application of Ness is attacked is that he did not make a bona fide effort to comply with the law in connection with his former entry, and for that reason, among others, he is not qualified to make a second homestead entry under the act of April 28, 1904. This contention is resisted by Ness, and it is further urged that he is entitled to have his case considered under the act of February 8, 1908, which does not contain the restrictive provision involved in the above contention. The local officers took the view that Ness was entitled to have his application considered under the said latter act, and your office seems to have taken the same view. The Department does not agree with this conclusion. January 6, 1908, Ness was notified of his preference right of entry by registered mail, and he received this notice on January 8, 1908, as shown by his signature to the registry return receipt. His preference right of thirty days therefore commenced to run on January 9 (the day he received notice being excluded). His preference right expired on February 7, 1908, the day before the act of February 8 became law. Therefore, the said law could not act upon the application of Ness

during the preference right period so as to bring it under the provisions of said law. The application of Finley, which had been filed prior thereto, was then left subject to the application of Ness under the act of April 28, 1904. Therefore the application of Ness cannot be considered under the said act of February 8, 1908. See case of *Bailey v. George*, 36 L. D., 518. However, it makes no material difference under which of the two acts the application of Ness be considered in view of the ruling herein made upon a point common to both acts.

Land covered with valuable timber may nevertheless be entered under the homestead law where the character of the land is such that it would be suitable for agricultural use if the timber were removed. See *Jones v. Aztec Land and Cattle Company*, 34 L. D., 115. *Patton v. Quackenbush*, 35 L. D., 561. But land not adaptable to any agricultural use is not subject to homestead entry. See *Davis v. Gibson*, 38 L. D., 265. The character of the land here involved, as shown by the record, is fairly stated in the opinion of the local officers above given.

The unfitness of this land for agricultural use to any reasonable extent is established, and, considering the great amount of timber thereon and the rough and almost worthless character of the land for agricultural purposes if cleared, strong reasons for suspecting the good faith of Ness in making application therefor under the homestead law, are apparent. Furthermore, his good faith is open to question by the fact of his procuring his mother to apply for a timber and stone entry (which it cannot be doubted he did), instead of making his application at once in the exercise of his preference right. He denies that his mother filed at his suggestion, but this denial seriously reflects upon his credibility as a witness. His mother's application was withdrawn only after it was discovered that Finley had a prior application therefor, which could only be defeated, if at all, by the exercise of the preference right of Ness gained by contest.

Whether or not Ness actually received any money for the relinquishment of his former entry is not important. It has not been satisfactorily proven that he did. He acknowledges that he received money from the party who held his relinquishment for disposal, but claims that this money was for his sister's relinquishment, which was also disposed of by the same party, and the record is fairly susceptible of this conclusion. But in the view of the Department it is immaterial whether he actually in person received the money for his relinquishment. It is established that it was sold for a valuable consideration by the person in whose hands he placed it, and was later bartered for a larger sum before being filed in the local office. Instead of filing the relinquishment in the local office so that the land

might be cleared for entry by any other bona fide applicant, he allowed it to become a subject of barter and sale. The relinquishment was of no effect until filed in the local office. It was then his relinquishment of the land and it was procured by payment of \$250. The Department cannot countenance the traffic here shown or consider it as being free from the disqualifying proviso in the acts of February 8, 1908, and April 28, 1904.

It must be held that Ness relinquished for a valuable consideration even though his agent and subsequent holders received and retained the money paid therefor. The application of Ness is therefore rejected and the application of Finley should be allowed if otherwise proper.

Your decision is accordingly reversed.

NOTATION OF RIGHTS OF WAY ON ENTRY PAPERS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 19, 1910.

REGISTERS AND RECEIVERS,

United States Land Offices.

SIRS: The first sentence of the circular of November 3, 1909 (38 L. D., 284), is hereby amended to read as follows:

In order that all persons making entry of public lands which are affected by rights of way may have actual notice thereof, you are directed to note upon the original entry papers and upon the notice of allowance of the application (Form 4-279) issued to the entryman, a reference to such right of way.

Very respectfully,

FRED DENNETT, *Commissioner.*

Approved:

FRANK PIERCE,
Acting Secretary.

NORTHERN PACIFIC ADJUSTMENT—FOREST LIEU SELECTION—ACT
JULY 1, 1898.

SANTA FE PACIFIC R. R. Co. v. NORTHERN PACIFIC RY. Co.

An application to make forest lieu selection under the act of June 4, 1897, by one who has done all that the law requires to entitle him to the selection, constitutes a claim subject to adjustment under the act of July 1, 1898, as extended by the act of May 17, 1906.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, January 19, 1910.* (S. W. W.)

This case is before the Department upon the appeal of W. H. Wilson, attorney-in-fact of the Santa Fe Pacific Railroad Company,

from your office decision of August 7, 1909, holding that the company's proffered selection under the act of June 4, 1897 (30 Stat., 36), for the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 27, T. 1 N., R. 22 E., The Dalles, Oregon, land district, may not be adjusted under the provisions of the act of July 1, 1898 (30 Stat., 597, 620), as extended by the act of May 17, 1906 (34 Stat., 197).

It appears from the record and your said decision that the tracts involved are within the indemnity limits of the grant made to the Northern Pacific Railroad Company for its constructed branch line, and is also within the limits of the withdrawal made for the main line extending from Wallula, Washington, to Portland, Oregon; that that portion of the main line was never constructed, and the grant appertaining thereto was forfeited by the act of September 29, 1890 (26 Stat., 496); that the said tracts were selected May 2, 1885, by the Northern Pacific Railroad Company as indemnity on account of its branch line, per indemnity list No. 1, which list was canceled December 7, 1892, for the reason that the lands were within the limits of the grant made on account of the main line which had been declared forfeited, and the said tracts were restored to entry.

This ruling was changed April 25, 1905, and on January 31, 1906, the selection of the Northern Pacific Railroad, now Railway, Company was reinstated.

It further appears that in the meantime, namely, on March 18, 1905, the Santa Fe Pacific Railroad Company, by W. H. Wilson its attorney-in-fact, presented its application to select the said tracts under the provision of the aforesaid act of June 4, 1897, which application was rejected by the local office April 29, 1905, for the reason that the said act of 1897 had been repealed by the act of March 3, 1905 (33 Stat., 1264). The Santa Fe Pacific Railroad Company appealed to your office, where it was held in your decision of September 8, 1905, that the selection by said company under the act of 1897 in lieu of lands in the San Francisco Mountains Forest Reserve, was covered by contracts entered into by the Secretary of the Interior prior to the passage of said act of March 3, 1905, *supra*, and therefore valid, and your office accordingly reversed the action of the local office and returned the papers with instructions that the same be accepted, if otherwise unobjectionable. September 16, 1905, the register certified to the application and transmitted the same to your office.

It is further disclosed that on January 25, 1908, Messrs. Britton & Gray, attorneys for the Northern Pacific Railway Company, by letter addressed to your office, invited attention to this claim and asked that it be considered with a view to its disposition under the said acts

of 1898 and 1906; whereupon your office, by letter dated August 28, 1908, held that the case appeared to come within the provisions of said acts, and directed the local office to notify the lieu selector that he would be allowed sixty days from receipt of notice in which to proceed under said act in the manner prescribed in the official regulations of February 14, 1899 (28 L. D., 103), and that his failure to do so within the time prescribed would be deemed an election to retain the land covered by said lieu selection. It seems that Wilson, the attorney-in-fact of the Santa Fe Pacific Railroad Company, was duly notified of the action of your office but took no action thereunder.

While no reason is assigned therefor, it further appears that about one year later your office reconsidered the case and on August 7, 1909, rendered the decision under consideration, in which it is held that while the forest lieu selection was improperly rejected by the local office when it was presented on March 18, 1905, nevertheless such selection required approval to give it validity, and that prior to such approval was but the proffer of a selection; that the act of 1906, *supra*, extended the provisions of the act of 1898 to include any *bona fide* settlement or entry made subsequently to January 1, 1898, and prior to May 31, 1905; and that as the claim of the Santa Fe Pacific Railroad Company was based merely upon an application to select, it is not, in the opinion of your office, of the class of cases subject to adjustment under the provisions of the said acts of 1898 and 1906, the cases of Northern Pacific Railway Co. v. Sherwood (28 L. D., 126), and State of Oregon v. Northern Pacific Railway Co. (35 L. D., 46), being cited in support of your conclusion.

The appeal assigns error in your decision in recalling your office letter of August 28, 1908, which awarded the lieu selector the right of election under the act of 1898, as extended by the act of 1906, and in holding that the lieu selection made by the Santa Fe Pacific Railroad Company required approval to give it validity, and contends that it was no fault of the lieu selector that his application was not accepted by the local office; that the base land assigned in support of the selection has been previously deeded to the government and accepted, for which reason it is submitted that the lieu selector should not now be made to suffer for faults committed by the officers of the government.

The Northern Pacific Railway Company, on the other hand, contends the claim is not entitled to adjustment under the act of 1898, for the reason that while the act of 1898 made provision for adjustment of "claims" as well as entries, in extending the provisions of said act, Congress, by the later law of 1906 merely provided that the provisions of said act of 1898 should be extended to include any *bona fide* settlement or entry, and that inasmuch as the Santa Fe Pacific

Railroad Company is not a settler or entryman within the meaning of the act your office decision was undoubtedly correct in refusing an adjustment of its claim thereunder.

The act of July 1, 1898, makes provision for the adjustment of conflicting claims of individuals and the Northern Pacific Railroad Company—

where, prior to January 1, 1898, the whole or any part of an odd-numbered section, in either the granted or the indemnity limits of the land-grant to the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor is claimed to have attached by definite location or selection, has been purchased directly from the United States or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States or any ruling of the Interior Department.

The act of May 17, 1906, *supra*, provides that the provisions of the act of 1898—

be and they hereby are extended to include any *bona fide* settlement or entry made subsequent to January 1, 1898, and prior to May 31, 1905, in accordance with the erroneous decision of the land department respecting the withdrawal on general route of the Northern Pacific railroad between Wallula, Washington, and Portland, Oregon, where the same has not since been abandoned.

As is well known, this Department held for a time that the company's grant of this land was forfeited by the act of 1890, and that ruling was in force until April 25, 1905, more than a month after the lieu selection involved herein was presented at the local office. It should be noted that the local office did not refuse to accept the selection on account of the conflicting claim of the Northern Pacific Railroad Company, but because they understood that the lieu selection provisions of the act of 1897 had been repealed by the act of March 3, 1905, *supra*, and, consequently, when the case was considered in your office the lieu selection was returned for allowance.

The only question involved in this case is whether or not this lieu selection, as presented to the local office on March 18, 1905, constituted an entry within the meaning of the act of 1906. It is observed that the act of 1898 makes provision for adjustment of claims based upon purchase, entry, or settlement, while the act of 1906, mentions only settlement and entry, the words "purchase" and "claims" being omitted. However, this is not considered material in view of the fact that the act of 1906 expressly extends to the territory described the provisions of the act of 1898, from which it is but reasonable to assume that the term entry as used in the act of 1906 includes also a purchase as well as an entry, and, indeed, any other class of claims contemplated by the act of 1898.

It is true, as stated in the decisions cited by your office, this Department has held that a mere application to enter which has not ripened into an entry, or which is not based upon settlement, is not

such a claim as is contemplated by the act of 1898, and in order, therefore, to determine whether or not the claim under consideration is a claim or entry within the meaning of the adjustment acts, it is necessary to consider the nature of the transaction involved in an exchange of land under the act of 1897, *supra*.

The Department has held that the essential requirements to be complied with by a person seeking title to a tract of land in exchange for land covered by a patent in a forest reservation—

1. That he must relinquish to the government the tract in the forest reservation, and submit satisfactory evidence in respect to the title thereto;

2. That he must make selection of the tract desired in exchange for the tract relinquished, and accompany the selection by proof showing the selected land to be of the condition and character subject to selection.

Kern Oil Co. *et al.* v. Clarke (30 L. D., 550).

And respecting the nature of the right acquired by relinquishment and reconveyance to the United States under the exchange provisions of the act of 1897, it has been held that the party making such relinquishment and selection acquires a right to have the selection approved, if there is otherwise no objection thereto, of which he can not be divested by the subsequent elimination from the boundaries of the forest reserve of the lands in lieu of which the selection is made. See case of Gideon F. McDonald (30 L. D., 124). In that case it was held that McDonald by accepting the standing offer or proposal of the government contained in the act of 1897 and complying with its conditions, thereby converted the mere offer or proposal into a contract fully executed upon his part, and in the execution of which by the government he had a vested right; that thereafter no act of either the executive or legislative branch of the government could divest him of the right so acquired.

Moreover, it has been also held that by relinquishment and reconveyance to the United States under the exchange provision of the act of 1897, the party making such relinquishment and selection acquires the right to have the selection approved, of which right he can not be divested by a subsequent order withdrawing the selected lands from settlement, sale, or disposal. *Clarke v. Northern Pacific Railway Company* (30 L. D., 145).

It is true that the Department, and the courts also, hold that until a selection is approved the selector does not acquire a complete equitable title, and that prior to his acquiring an equitable title the government reserved the right, and might exercise it, of investigating any questions affecting the validity of the exchange. See *Cosmos v. Gray Eagle Co.* (190 U. S., 301). In that case, however, it does not appear that the government had ever accepted the relinquishment of the base tract assigned in support of the selection, and a further question was involved as to the right of the government to determine prior

to the approval of the selection whether or not the land selected was of the character contemplated by the act providing for the exchange. It is at once apparent that no such questions are involved in this case.

This case appears to be similar in many respects to the case of *Allyn v. Northern Pacific Railway Co.* (37 L. D., 604), decided by the Department April 26, 1909, in which it was held that where, prior to May 31, 1905, a timber and stone applicant submitted satisfactory proof and tendered the proper fees and purchase price but upon which entry was withheld, not on account of any defect in the proofs but solely to await investigation by a special agent under general instructions in respect to timber and stone proofs, the claim of the applicant will be regarded as an entry within the purview of the act of July 1, 1898, as extended by the act of 1906, and therefore subject to adjustment under the provisions of these acts.

In that case it was stated that prior to May 31, 1905, the date specified in the act of 1906, Allyn had done everything within his power in order to enter the land, and it was through no fault of his that his entry had not been allowed, and reference was made to the decisions of the Supreme Court of the United States in the case of *Wirth v. Branson* (98 U. S., 118), and *Lytle v. State of Arkansas* (9 How., 314), in the former of which it was held that—

The rule is well settled by a long course of decisions that when public lands have been conveyed and purchased in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent for a particular lot or tract is to be regarded as the equitable owner thereof.

From the facts stated in this case it will be seen that the claim of the lieu selector was exercised under the erroneous decision of this Department announced in the Spaulding case, published in Vol. 21 of Land Decisions; that his proffered selection was rejected by the local office, not because of conflict with the railroad claim but because of the erroneous supposition of the local officers that the lieu selection act had been repealed, and that in no event therefore might the selection be accepted. The act, however, was reversed by your office letter of September 25, 1905, and the selection was returned for allowance.

Under the rule obtaining at the time this lieu selection was presented, it should have been allowed, and there would, therefore, seem to be no doubt that the selection constituted an entry within the meaning of the act of 1906, and is *prima facie* entitled to adjustment thereunder. This holding is not intended, however, to preclude your office from further examination of the selection for the purpose of ascertaining whether any objections appear other than those considered herein.

Your office decision is reversed and the case remanded for further action not inconsistent herewith.

JAMES C. KENNEDY.

Motion for review of departmental decision of November 6, 1909, 38 L. D., 289, denied by First Assistant Secretary Pierce, January 20, 1910.

RAILROAD RIGHTS OF WAY-POWER SITES.

REGULATIONS.

Addenda to regulations concerning railroad right of way over the public lands, and forfeiture acts, approved May 21, 1909 (37 L. D., 787).

Section 5 of the above regulations is hereby amended and extended by the addition thereto, after paragraph (g), the following paragraph, designated (h) :

A stipulation by the president, under the seal of the company, whereby it stipulates and agrees, as a prerequisite to the approval of the right of way applied for, that it will, upon proper request, elevate or move its track and road-bed, in the event of the present or future withdrawal of any portion of the public lands over which such right of way passes for power purposes.

Such stipulation shall read as follows:

STIPULATION.

It is hereby stipulated and agreed by the _____ Company, in consideration of, and as a prerequisite to the approval of its application for right of way, from a point in _____ to a point in _____, which was filed in the Land Office _____, that if said application is granted and approved, it, the said company, will change, move and elevate its tracks, road-bed and all appliances appurtenant thereto, at its own proper cost and expense, and without cost to the Government of the United States, its lessees, grantees, their successors in interest, heirs or assigns, upon ninety-day written notice so to do from the Secretary of the Interior, such changing, moving, and elevation of its tracks, road-bed and appurtenances as aforesaid, to be made to such height and distance from the approved right of way and constructed road-bed and in such manner as may be deemed necessary by the Secretary of the Interior, for the purpose of utilizing to the best advantage any public lands of the United States over which said right of way passes, and which may now or hereafter be withdrawn by the Secretary of the Interior or by any other lawful authority, for the conservation or use of power, power sites, or power purposes.

The _____ Company hereby consents to accept said right of way subject to the terms and conditions of this stipulation.

[CORPORATE SEAL.]

Attest:

Company.

 President.

Secretary.

Corporate acknowledgment.

Approved, January 29, 1910:

FRANK PIERCE.

Acting Secretary.

FULTON v. BUCHHOLZ.

Motion for review of departmental decision of August 27, 1909, 38 L. D., 175, denied by First Assistant Secretary Pierce, January 29, 1910.

UNION PACIFIC RY. CO. ET AL.

Motion for review of departmental decision of October 12, 1909, 38 L. D., 262, denied by First Assistant Secretary Pierce, January 31, 1910.

SECOND HOMESTEAD ENTRY—DISCRETIONARY POWER OF SECRETARY.

MARMADUKE WILLIAM MATHEWS.

The acts of April 28, 1904, and February 8, 1908, authorizing second homestead entries, do not take away from the Secretary of the Interior the discretionary power theretofore vested in and exercised by him as head of the land department to permit second entries on equitable grounds in meritorious cases where the first attempt to exercise the homestead right failed of consummation because of accident, mistake, or other sufficient cause. Finsans Erhardt, 36 L. D., 154, paragraph 9 of instructions of June 11, 1907, 35 L. D., 590, and paragraph 8 of instructions of February 29, 1908, 36 L. D., 291, overruled.

First Assistant Secretary Pierce to the Commissioner of the General (O. L.) Land Office, February 1, 1910. (J. R. W.)

Marmaduke William Mathews appealed from your decision of February 6, 1909, rejecting his application for second homestead entry for lots 2 and 3, Sec. 30, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 31, T. 164 N., R. 79 W., Devils Lake, North Dakota.

April 6, 1908, Mathews made homestead entry for lots 2 and 3, Sec. 19, T. 163 N., R. 79 W., 73.56 acres, canceled on relinquishment September 8, 1908. He applied for entry of the land first above described, filing affidavit corroborated by two witnesses, setting up the first entry and that such land—

is totally covered with water, is unfit for agricultural purposes or hay land; that affiant is unable to live on said land as there is no part of it not under water at present time upon which he can erect a building, and for such reasons affiant has been unable to commence his residence or make any improvements thereon since filing; that said tract is lowland contiguous to the bed of Mouse River and the bed of the river itself and for the greater part of each year is in the condition here described, but that at the time of making his filing thereon the water of the river was very low and the ice was not all thawed and affiant was unable to ascertain the real condition of the land and did not receive reliable information concerning the same before filing. Wherefore affiant asks that said entry be canceled and his filing for [land now applied for] be accepted.

You held that:

As applicant's former entry was not made until April 6, 1908, he does not appear to be entitled to the benefits of act of February 8, 1908 (35 Stat., 6). His application is accordingly denied.

The act referred to provides:

That any person who, prior to passage of this act, has made entry under the homestead laws, but from any cause has lost, forfeited or abandoned the same, shall be entitled to the benefits of the homestead law as though such former entry had not been made, and any person applying for a second homestead under this act shall furnish the description and date of his former entry: *Provided*, That the provisions of this act shall not apply to any person whose former entry was canceled for fraud, or who relinquished the former entry for a valuable consideration.

A similar act was that of April 28, 1904 (33 Stat., 527), upon which the Department held in *Finsans Erhardt* (36 L. D., 154) that "the Secretary of the Interior does not have the discretionary power which was exercised prior to the passage of the act of April 28, 1904."

These acts are in substance mandates of Congress to the land department to allow second homestead entries in cases wherein the applicants show they are within the provisions named in them. They were, however, construed as acts of limitations upon the power of the land department to grant relief in cases of accident and mistake. By instructions of June 11, 1907 (35 L. D., 590), the act was construed as a limitation, paragraph 9 being that:

In the absence of legislation by Congress, restoring the homestead right, the making of one homestead entry for the maximum area allowed by law exhausts the homestead right, and this Department is without authority to allow second entries to be made. When applications to make second entries are presented and fail to show that they come within the purview of any of the acts of Congress allowing second homestead entries, registers and receivers will reject such applications, giving the reasons therefor and allowing the usual right of appeal.

This was adopted in the same words as paragraph 8, instructions of February 29, 1908 (36 L. D., 291), as applicable to second entries under act of February 8, 1908, *supra*. This was a new departure from the former holding of the land department, which was (General Circular of January 25, 1904, p. 19) that:

In some cases, however, where obstacles which could not have been foreseen, and which render it impracticable to cultivate the land, are discovered subsequent to entry (such as the impossibility of obtaining water by digging wells or otherwise), or where, subsequently to entry, and through no fault of the homesteader, the land becomes useless for agricultural purposes (as where by the deposit of "tailings" in the channel of a stream a dam is formed, causing the waters to overflow), the entry may in the discretion of the Commissioner of the General Land Office be canceled and a second entry allowed.

This was an equitable power for relief of accident or mistake, or wrong of others than the entryman. Such equitable power arises

from the nature of the land department as the tribunal of sole jurisdiction to administer the public land laws. In the homestead law "the end in view was the peopling of vacant public lands with settlers owning and cultivating their own homes." *Webster v. Luther* (163 U. S., 331, 340). The right was accorded to every citizen, or head of family, and the public benefit from extension of the productive agricultural area and increase of number of citizenship, as a measure of national concern and wise public policy, was deemed full consideration for the land donated to those who accepted its benefits.

Accident and mistake are inevitable in human affairs. The object of Congress and the object of the citizen in accepting its offer must sometimes fail of accomplishment through no fault of the entryman. The land department having all and sole jurisdiction to administer the act necessarily had power to grant relief in such case as any other tribunal would have in similar case to relieve from the hardships of accident and mistake. Equitable rights are within jurisdiction of the land department to determine. *Brown v. Hitchcock* (173 U. S., 473, 478). It may relieve against unforeseen occurrences not provided for by express statutory provisions. *Williams v. United States* (138 U. S., 514, 524). The land department has been wont to exercise such powers from the earliest times. The rule of approximation is an example, express restrictive words as to area that may be entered under various statutes being forced to yield, as to fractions of subdivisions, to administrative necessity in order to effectuate the spirit and purposes of the land laws. *Instructions* (31 L. D., 225).

The homestead law as construed by the land department is like the preemption law in respect to a single exercise of the right. In *Hannah M. Brown* (4 L. D., 9) the right was attempted to be exercised but was defeated of fruition by a prior right to the tract, and when Mrs. Brown attempted to exercise it it was claimed that she was disqualified. The Department held that:

When the law restricted persons, otherwise properly qualified, to "one preemptive right," it meant a right to be enjoyed in its full fruition; not that a fruitless effort to obtain it should be equivalent to its entire consummation.

The object of the homestead law being "the peopling of vacant public lands with settlers owning and cultivating their own homes," it was early held by your office and by the Department that attempt to exercise it on land unfit for a home and not susceptible of cultivation, did not bar allowance by the land department of another entry. *L. P. Skarstad et al.* (1 L. D., 56); *Silas Halsey* (2 L. D., 171); *Edwin Edwards* (8 L. D., 429); *William E. Jones* (9 L. D., 207); *Samuel P. Durham* (10 L. D., 557); *Lewis Wilson* (21 L. D., 390); *John Herkowski* (28 L. D., 259, 260). Many other decisions, not

only under the homestead law but under other laws giving a single right like the preemption and timber and stone acts, might be cited. Those given suffice to show that from early in history of the homestead law it was recognized that when there was mistake in the character of the land whereby the intent of the law and intent of the entryman for cause not his fault were defeated, the right was deemed not exercised and right to make entry could be recognized as existing.

This salutary and eminently equitable rule is not taken away by the act of April 28, 1904, or of February 8, 1908, *supra*, or by any other act of like or similar tenor and purpose. Those acts are remedial merely. They show no purpose to take away salutary powers long exercised and exercised and existing from organization of the land department. They are not acts of limitation of power but are grants of right in cases not within the ordinary and long-exercised power of the land department. The instructions and decision in *Finsans Erhardt*, cited as authority for your decision, construing these acts to be limitations upon the power of the land department to grant relief in such cases, are clearly misconstructions of these relief acts, and erroneous, and will no longer be observed by your office.

The proofs satisfactorily show that the object of the homestead law and intent of Mathews in making his entry were defeated without his fault; that the entry was made by mistake as to the character of the land, which was utterly worthless and incapable of cultivation or to be improved and made a home. He never in fact intelligently exercised his homestead right and it will be recognized by your office as not exercised and not exhausted by his illjudged and futile attempt. If no other objection exists his application will be allowed.

COLVILLE RESERVATION—MINING CLAIMS—ALLOTMENTS.

INSTRUCTIONS.

By virtue of the provisions of the act of July 1, 1898, mineral lands within the diminished Colville Indian reservation are subject to location and entry under the mining laws.

A mere paper location, not based upon a valid discovery of mineral, does not withdraw the land from allotment, and allotments thereof may be made, due care being exercised not to make allotments of lands which are in fact mineral.

First Assistant Secretary Pierce to the Commissioner of Indian Affairs, February 1, 1910.
(O. L.)

You submit under date the 12th instant, for department approval, recommendations to govern the action of the Commissioner of the

General Land Office in the matter of mining claims on the diminished Colville Indian reservation. You recommend:

First. That you be authorized to instruct the superintendent in charge to notify all persons attempting to file mineral claims thereon that such proceedings are unwarranted and that if they do not discontinue further operations along that line they will be regarded as trespassers and proper steps will be taken to remove them from the reservation.

Second. That the filing of no more mineral entries on the south half of the Colville reservation be permitted and that the necessary steps be taken, where such can be done, to cancel or otherwise vacate all previous entries which have been made thereon.

You quote from the act of July 1, 1898 (30 Stat., 593):

That the mineral lands only in the Colville Indian Reservation, in the State of Washington, shall be subject to entry under the laws of the United States in relation to the entry of mineral lands: *Provided*, That lands allotted to the Indians or used by the Government for any purpose or by any school shall not be subject to entry under this provision.

Also from the act of March 22, 1906 (34 Stat., 80), section 3, providing:

That upon the completion of said allotments to said Indians the residue or surplus lands—that is, lands not allotted or reserved for Indian school, agency, or other purposes—of the said diminished Colville Indian Reservation shall be classified under the directions of the Secretary of the Interior as irrigable lands, grazing lands, timber lands, mineral lands, or arid lands, and shall be appraised under their appropriate classes by legal subdivisions, with the exception of the lands classed as mineral lands, which need not be appraised, and which shall be disposed of under the general mining laws of the United States.

You give as your opinion that the act of 1898, construed with the act of 1906, does not permit mineral entries to be made within the diminished Colville reservation prior to the allotments and that there is no provision in either act whereby mineral entries may be made prior to allotments.

The circular of August 11, 1898 (27 L. D., 366), recognized the fact that mining locations may be made under the act of July 1, 1898, and that provision is neither annulled nor modified by the act of March 22, 1906 (34 Stat., 80).

See also 30 L. D., 88-89, wherein Assistant Attorney-General Van Devanter, in an opinion dated June 26, 1900, addressed to the Secretary of the Interior, relative to the cutting of timber on mining claims on the south half of the Colville Indian reservation, Washington, stated:

Thus the mineral lands within the boundaries of the present reservation were made subject to location and entry under the mining laws.

As to the assertion that a large portion of the mineral claims within the south half of the reservation are fraudulent, in that the

land is not mineral in character, but is first-class farming and fruit land, the department December 6, 1905, upon your recommendation, directed the Commissioner of the General Land Office to instruct the officials of the local land offices to refuse to accept any placer mining filings until indisputable evidence of the true character of their claims is produced and also directed that the whole subject of placer mining on the south half of the reservation be investigated by a mining expert. The local officers were so instructed December 9, 1905, and investigation has been made and upon the reports filed suits have been recommended to set aside certain mineral patents and steps are being taken to declare void certain mining applications and locations, all upon motion of the land department. And the department is informally advised by the Commissioner of the General Land Office that no mineral entry in the south half of the reservation will be passed to patent until there has been filed convincing evidence that the land is properly subject to entry under the mineral land laws, and that all cases arising directly between mineral claimants and Indian allottees involving the mineral character of the land will when presented receive careful and prompt attention.

The steps taken and contemplated by the Commissioner and the General Land Office appear sufficient, under present conditions shown, to protect the interests of all parties, and a suspension of the operation of the mineral land laws over the south half of the reservation for the purposes asked would be unwarranted in the face of the provisions of the act of July 1, 1898, *supra*.

With reference to the question of allotting to the Indians lands embraced in mining locations which have been adjudged invalid because of the fact that there is no mineral therein, or of locations which have not been made the subject of decision-but which in fact do not contain mineral, you are directed to advise the superintendent of the agency and the allotting agent that allotments to the Indians of such lands may be made, because a mere paper location, not based upon a valid discovery of mineral, does not withdraw the land from allotment. In such cases the allotting agent should exercise due care not to make allotments on lands which are in fact mineral, and in this connection it is suggested that the allotting agent may in such cases call upon the Chief of Field Division, General Land Office, to assign a mineral expert to examine the lands and, if found by him to be in fact non-mineral, to proceed to allot the same as in other cases, and if in such cases the mineral claimant attempts to continue in possession of the reported invalid locations, proceedings thereagainst can be instituted by this Department to obtain possession of the land.

The superintendent's letter, with its enclosures and the supplemental report of special allotting agent Hunt, are returned as requested.

**RELINQUISHMENT—HOMESTEAD ENTRY—NONCONTIGUOUS TRACTS—
EQUITABLE ADJUDICATION.****GEORGE H. PLOWMAN.**

The relinquishment of part of a homestead entry, which would render the remaining tracts noncontiguous, should not be accepted.

Where, however, such a relinquishment was accepted, and the entryman upon faith of such action complies with the law and submits proof with respect to the remaining noncontiguous tracts, the entry may be submitted to the Board of Equitable Adjudication with a view to confirmation.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, February 1, 1910.* (S. W. W.)

This is the appeal of George H. Plowman from your office decision of September 17, 1909, holding that his homestead entry, hereinafter described, may not be submitted to the Board of Equitable Adjudication.

It appears that on January 2, 1906, Plowman made homestead entry, No. 28685, for the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 19, T. 22 N., R. 21 W., Woodward, Oklahoma, land district; that on December 21, following, his entry was canceled as to the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$, upon his relinquishment, and on the same day that land was entered by Mary A. Wood; that final proof was submitted by Plowman for the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, the two tracts remaining in his entry, upon which final certificate No. 69190 was issued May 1, 1908.

It further appears that by your office letter "C" of October 24, 1908, the local office was directed to advise Plowman of the condition of his entry, and that he would be required to show cause why his entry should not be canceled, or to elect which of the forty-acre tracts he would relinquish, and that in the event of his failure to take action within the time specified, his entry would be canceled. Plowman appealed to the Department, where it was decided, under date of June 4, 1909, that the action of your office was correct, but inasmuch as patent may issue under certain conditions for noncontiguous tracts (B. F. Bynum *et al.*, 23 L. D., 389, and Akin *v.* Brown, 15 L. D., 119), it was held that further time should be allowed Plowman to comply with the requirements of your office to show cause why his entry should not be canceled.

In an affidavit submitted in accordance with the said requirement, Plowman alleges that about the month of December, 1906, he was financially distressed and was offered three hundred dollars to relinquish the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of the land entered by him; that before doing so he consulted with several reliable persons as to whether or not he could properly relinquish that particular portion of his entry and at the same time make proof and secure patent for the remaining

tracts which were rendered noncontiguous by reason of the elimination of the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$, and he was told that he could do so; that he is an old man and resided faithfully upon the land, which constituted his only home, and is still residing there; that he has complied with the law as best he could and prays that the case be referred to the Board of Equitable Adjudication for relief.

From the decision of your office denying this prayer Plowman has appealed to the Department.

It is well established that the homestead law as construed by the Department requires that homestead entries may not properly embrace noncontiguous tracts, and that tracts which only corner upon each other are not contiguous and do not form parts of one body of land. This being so, it would seem to follow that the action of the local office and of your office also, in accepting Plowman's relinquishment of such a portion of the land entered by him as left the remaining tracts noncontiguous, was improper. Not only does it appear that he was allowed to relinquish his entry in this manner, but it is further shown that he was permitted to make final proof in support of his entry as reduced, upon which final certificate was issued to him.

This case does not fall entirely within the rule laid down by the Department in the cases cited. It is apparent, however, that Plowman was advised by those with whom he consulted that he might properly take such action, and he was even permitted to do so by the register and receiver.

By section 2450 of the Revised Statutes, as amended, the Commissioner of the General Land Office is authorized to decide, upon principles of equity and justice, as recognized in courts of equity, and in accordance with regulations to be settled by the Secretary of the Interior, the Attorney-General, and the Commissioner of the General Land Office conjointly, consistent with such principles, all cases of suspended entries of public lands. Under this authority of law regulations have been issued providing for the equitable adjudication of entries made under the public land laws. These regulations were issued originally prior to the enactment of the homestead law and at a time when preemption entries constituted by far the greater number of entries which required action of the nature indicated, hence the first rules issued relate chiefly to preemptions. Rule ten provides (General Circular, page 246):

Preemption entries founded upon a *bona fide* right of preemption, where, as it respects the mode and manner of the entry, there is not a strict conformity with the law, but where such entry does not embrace a quantity exceeding that allowed by law, is in accordance with the wish of the party or parties interested and does not interfere with the rights or interests of another.

It is believed that if this were a preemption entry it could, in the absence of other objection, be patented under the provisions of the

rule above quoted, and inasmuch as the rule relating to the contiguity or compactness of tracts entered under the preemption law is also applicable to tracts entered under the homestead law, there seems to be no reason why rule ten of the regulations may not be applied with equal force to a homestead entry.

As originally located, this entry formed one body of land consisting of contiguous tracts, and the requirement of the homestead law in that regard was therefore fully met. The entryman was subsequently permitted, in disregard of the rule obtaining, to relinquish a portion of his entry and to submit final proof upon the tracts not relinquished. Under these circumstances it is believed that his case should be submitted to the Board of Equitable Adjudication with favorable recommendation, provided it is found upon examination of his proof that he has in all other respects made a substantial compliance with the homestead law.

Your office decision is modified accordingly.

OKLAHOMA LANDS—RAILROAD RIGHTS OF WAY—ANNUAL FRANCHISE TAX.

INSTRUCTIONS.

The annual payment of fifteen dollars per mile of road, required by various acts of Congress granting rights of way to railroad companies through the Indian Territory, is not in the nature of compensation, nor a property tax upon the land involved, but is in the nature of a franchise tax or charge upon the business of the corporation constructing the road; and is in no wise affected by the departmental regulation fixing November 1, 1908, as the date prior to which railroad companies might acquire title to the land occupied by them for rights of way, etc.

After the State of Oklahoma was admitted into the Union, November 16, 1907, the Indians, as tribes or nations, ceased to own and occupy the lands in the sense in which that expression is used in the acts of Congress fixing the fifteen-dollar charge, and thereafter such charge could not lawfully be exacted. However, the payment for the year ending June 30, 1908, being payable in advance, must be paid in full.

First Assistant Secretary Pierce to the Commissioner of Indian Affairs,
(F. W. C.) *February 2, 1910.* (S. W. W.)

The laws under which rights of way were granted to railroad companies in the former Indian Territory contain, substantially, the following provision:

▼ That where a railroad is constructed under the provisions of this act there shall be paid by the railway company to the Secretary of the Interior, for the benefit of the particular tribe or nation through whose lands any such railroad may be constructed, an annual charge of fifteen dollars per mile for each mile of road constructed, the same to be paid so long as said lands shall be owned and occupied by such nation or tribe.

See section sixteen of the act of February 28, 1902 (32 Stat., 43, 48); also act of March 2, 1887 (24 Stat., 446); act of February 18, 1888 (25 Stat., 35); act of February 27, 1893 (27 Stat., 492); section five of the act of March 2, 1899 (30 Stat., 990); act of February 24, 1896 (29 Stat., 13); and other acts granting special rights of way to railway companies through the Indian Territory.

By the acts of July 1, 1902 (32 Stat., 716); March 1, 1901 (31 Stat., 861); and July 1, 1902 (32 Stat., 641), ratifying agreements with the Cherokee, Creek, Choctaw and Chickasaw nations, provision is made whereby lands, to which railway companies had acquired a vested right for rights of way for station grounds etc., prior to the date of the ratification, were reserved from allotments to the Indians.

By section fourteen of the act of April 26, 1906 (34 Stat., 137), Congress, in providing a means for closing up the affairs of the Five Civilized Tribes, declared:

That this section shall not apply to land reserved from allotments because of the right of any railroad or railway company therein in the nature of an easement for right of way, depot, station grounds, water stations, stock yards, or other uses connected with the maintenance and operation of such company's railroad, where title to such tracts may be acquired by the railroad or railway company under rules and regulations to be prescribed by the Secretary of the Interior at a valuation to be determined by him; but if any such company shall fail to make payment within the time prescribed by the regulations or shall cease to use such land for the purpose for which it was reserved, title thereto shall thereupon vest in the owner of the legal subdivision of which the land so abandoned is a part, except lands within a municipality the title to which, upon abandonment, shall vest in such municipality.

Under date of June 12, 1908, the Secretary of the Interior approved regulations governing the acquirement of title by railway companies occupying lands in the former Indian Territory, for depots, station grounds, etc., in which November 1, 1908, was designated as the date prior to which any company holding title in the nature of an easement might acquire the fee simple title to such lands, as provided in section fourteen of the act of 1906, above mentioned. This date, it seems, was subsequently extended to March 1, 1909, in order that the appraisers appointed to value the right of way of the Midland Valley Railroad Company might have ample time within which to complete their work.

January 22, 1908, your office, in a letter addressed to the Department, expressed the opinion that there was sufficient authority of law to require railway companies to pay the annual charge of fifteen dollars a mile accruing up to and including November 1, 1908, the date originally designated in the departmental regulations above mentioned, which opinion was approved by Assistant Secretary Wilson, February 19, 1909, and, in accordance with the views of your office as thus approved, calls were made by the Commissioner

to the Five Civilized Tribes upon the various railway companies operating roads in the former Indian Territory to pay this annual charge of fifteen dollars per mile up to November 1, 1908.

The railway companies refused to make such payment, some assigning one reason and others another, it being maintained by some of the companies that upon the allotment of the lands to individual Indians their tribes or nations no longer had any title thereto. Others of the companies maintained that upon the admission of Oklahoma as a State, on November 16, 1907, the right of the tribes or nations to demand this charge ceased.

The opinion of your office was evidently based upon the theory that the charge of fifteen dollars per mile was in the nature of a property tax upon the land occupied as a right of way, because your office held that the right to receive this payment existed in the Indian tribes or nations until November 1, 1908, on which date, by operation of law, the title to land occupied as rights of way by railway companies vested in the owners of the subdivisions in which the rights of way were located, unless, of course, the railway companies had, in accordance with the regulations of the Interior Department, proceeded to acquire fee simple title to such rights of way as prescribed in the act of April 26, 1906, *supra*.

In view of the importance of the questions raised, and because of the diverse opinions expressed by the interested parties, the Department, under date of November 18, 1909, directed your office to notify interested parties that they would be permitted to present their views at an oral hearing to be held on December 15, 1909, on which day various companies were represented by counsel, and others have since been heard on briefs.

In order to make a proper disposition of the questions involved it becomes necessary to determine first whether or not this annual charge of fifteen dollars per mile exacted of the railway companies, is a part of the compensation for the land, or whether it is a property tax upon the land itself, or whether it is a charge in the nature of a franchise tax.

It is not believed that Congress considered the annual payment of fifteen dollars per mile as a part of the compensation to be paid to Indians by the companies who might construct railroads in the Territory, for the reason that compensation is usually reckoned as a fixed sum, payable at once or in parts, the amount, however, being always definite or determined, while a tax is usually in the nature of an annual payment for an indefinite period. Moreover, that this charge of fifteen dollars per mile did not constitute a tax on the land itself is evident from the fact that the railway company did not acquire fee simple title to the rights of way but merely a right therein in the nature of an easement, as the fee simple title remained in the tribe

or nation. That Congress did consider this annual charge in the nature of a tax, is shown by the fact that provision was made in most of the statutes providing for the acquirement of rights of way through Indian Territory to the effect that Congress, or the State subsequently created, should not thereby be precluded from imposing any "additional tax."

Another reason for holding that the annual payment of fifteen dollars per mile was not compensation either to the individual Indians affected or to the nations or tribes, exists in the fact that the railway companies were required not only to pay the individual occupant of the land affected by the right of way the amount of damages resulting from the right of way but the companies were also required to pay the tribes or nations the sum of fifty dollars per mile for each mile of road constructed, and it is reasonable that this payment to the individual affected and to the tribe or nation was considered the compensation to be paid for the right of way.

Upon careful consideration, therefore, the Department holds that the annual payment of fifteen dollars per mile was not in the nature of compensation, was not a property tax upon the land involved, but was in the nature of a franchise tax or charge upon the business of the corporation constructing the road.

In this view of the case it is not believed that the payment of this charge is in anywise affected by the regulations of the Interior Department issued under the regulations of April 26, 1906, and fixing November 1, 1908, as the date prior to which railway companies might acquire title to the land occupied by them for rights of way, etc.

While it is true that the tribal conditions of the Indians still exist for certain purposes, they no longer have any such existence as they had at the time of the enactment of the various acts of Congress by which provision was made for granting rights of way to the railway companies. When those acts of Congress were passed there was no State or Territorial government except that of the Indian tribes or nations, and the payment of this annual charge of fifteen dollars per mile was exacted by Congress for the benefit of the tribal governments. While the tribes still have existence for certain special purposes, they no longer exercise the functions of a political government, as the tribal government has been superseded by that of the State. In brief, after the admission of the State of Oklahoma the Indians ceased to own and occupy the lands in the sense in which that expression is used in the acts of Congress involved.

However, it must be observed that the State was admitted on November 16, 1907, and at that time the charge for the year ending June 30, 1908, had accrued and been payable for more than four

months. This charge was, under the administration of the Department, payable annually in advance, and inasmuch as the payment for the year ending June 30, 1908, should have been made in advance, it follows that the full annual charge for that year must be paid by the companies interested. In this connection it should be noted that one or more of the companies have already paid the full charge for that year.

The approval of the suggestion contained in your office letter of January 22, 1908, is modified accordingly.

HOMESTEAD ENTRY BY INSANE ALIEN—ACT OF JUNE 8, 1880.

SIMON HAFDAL.

An alien who was deported within three years after coming to this country, on the ground of insanity existing prior to his arrival, was not qualified to initiate a homestead claim, notwithstanding he may have declared his intention to become a citizen, and an entry made by him is not confirmed by the act of June 8, 1880.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, February 3, 1910.* (G. C. R.)

Simon Hafdal has appealed from your office decision of October 22, 1909, requiring him to show cause within sixty days why his homestead entry 0842, made October 29, 1908, for the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 36, T. 158 N., R. 28 W., Cass Lake, Minnesota, should not be canceled, and Carl Anderson's homestead entry No. 1123 (0841), made for the same land July 5, 1907, be re-instated.

On July 17, 1908, there was executed the following paper before a United States commissioner.

Gust Bergstrom, being first duly sworn, deposes and says that he is the brother of Carl Anderson, who made homestead entry No. 1123, for the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 36, T. 158 N., R. 28 W.; that during the latter part of March, 1908, the said Carl Anderson became insane, and on or about the 6th day of July, 1908, was deported to Sweden, by order of the Secretary of Commerce and Labor; that I am the only relative of said Carl Anderson capable of inheriting said homestead; and that I hereby relinquish all claims to the above described entry.

On the same date, and before same officer, Simon Hafdal executed a contest affidavit, and alleged that Anderson, who made said entry—has been adjudged insane, and has been deported to Sweden, and his only relative capable of inheriting is Gust Bergstrom.

The contest affidavit and Bergstrom's relinquishment were filed in local office October 9, 1908, together with a letter dated July 5, 1908, from Charles W. Seaman, Immigration Inspector in charge at Minne-

apolis, Minnesota, the letter being addressed to Gust Bergstrom at Loman, Minnesota. The inspector in said letter said:

I beg to advise you that your brother Carl Anderson, an insane public charge at the State Hospital, Fergus Falls, Minnesota, has been ordered deported by the Secretary of Commerce and Labor. This decision was anticipated in my letter to you of the 27th ultimo. I am unable to state the exact date of his departure, but he will probably be deported some time within the next three weeks.

The register, October 20, 1908, advised Hafdal that his contest affidavit failed to state a cause of action, but added:

The relinquishment executed by Gust Bergstrom, filed by you in the above case, as aided by the letter of Charles W. Seaman, Inspector in charge of the Immigration Service, while not in the best of form, is deemed by us to be sufficient to warrant the cancellation of the entry. You should therefore immediately file in this office your application to enter said land.

So instructed, Hafdal filed his application, and his entry for the land was, October 29, 1908, allowed—Anderson's entry (presumably) being canceled.

No one is here protesting against Hafdal's entry, and, as observed, Bergstrom, brother of entryman and the only heir capable of inheriting, as sworn to by him, has relinquished all his interest in the land. Under such circumstances, the Department is of opinion that Hafdal's existing entry should not be canceled.

Moreover, it is doubtful if Anderson can ever become a citizen of the United States, although it appears that on June 12, 1907, he declared his intention to become such before the District Court of Koochiching County, Minnesota.

On request of the Department for information in this case, the Department of Commerce and Labor, January 26, 1910, stated that the entryman Anderson arrived on April 13, 1907, at the Port of St. John, N. B., and was examined by the immigration officers and admitted; that the exact date of his entry is not known, but apparently was shortly after the date of his inspection and admission. The Department of Commerce and Labor further said:

On April 1, 1908, he (Anderson) was certified to be insane and a public charge in the State Insane Hospital at Fergus Falls, Minnesota, from causes existing prior to landing. Warrant of arrest thereupon issued, and a hearing was given thereunder. . . . The Department was satisfied that the causes of the insanity antedated arrival in the country, and directed deportation to Sweden, which was effected on July 31, 1908, from Montreal, Province of Quebec, Canada. A brother, Gust Bergstrom, residing at Loman, Minnesota, and an uncle, Christ Swenson, residing in Minneapolis, Minnesota, are the only known relatives in this country.

The twentieth section of the act of February 20, 1907 (34 Stat., 898, *et seq.*), provides:

That any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing, shall, upon

the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came, at any time within three years after the date of his entry into the United States.

Section 21 of said act provides:

"That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this act, or that an alien is subject to deportation under the provisions of this act, or of any law of the United States, he shall cause such alien, within the period of three years after landing or entry therein, to be taken into custody and returned to the country whence he came, as provided by section twenty of this act.

It appearing from investigation and report made by the Department of Commerce and Labor that the cause of Anderson's insanity antedated arrival in this country, deportation was properly effected in pursuance of the statute quoted.

Anderson's expressed intention of becoming a citizen was wholly nugatory. As stated by the Supreme Court of the United States in *Ju Toy* (198 U. S., 253):

The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate.

If the entryman could not, by reason of insanity, become a citizen of the United States, from which he was deported within three years from arrival, for causes existing prior thereto, it would appear that he was not qualified to initiate a homestead claim, and therefore the confirmatory act of June 8, 1880 (21 Stat., 166), has no application to this case. His heirs, if any, can not have any further or better right to the land than he.

It follows that no error was committed by the local officers in cancelling Anderson's entry.

Hafdal's entry, under the circumstances stated, will be allowed to remain intact, subject to future compliance with the law.

The action appealed from is reversed.

DESERT-LAND ENTRY—FINAL PROOF—RECLAMATION—DISTRIBUTION OF WATER.

ALONZO B. COLE.

Where the final proof submitted upon a desert-land entry shows that the entrymen has cultivated and irrigated at least one-eighth of the land, and has constructed ditches, owns a sufficient water right, has brought water to the land, and is prepared to turn water upon the entire tract when it shall have been cleared and prepared for cultivation, he is not required to show further that water has actually been distributed over all the irrigable land in the entry.

Directions given for amendment of the circular of November 30, 1908, 37 L. D., 312, to accord with the views herein expressed.

First Assistant Secretary Pierce to the Commissioner of the General Land Office, February 4, 1910. (J. H. T.)

March 1, 1906, Alonzo B. Cole made desert land entry for the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 35, T. 37 N., R. 15 W., W. M. M., Durango, Colorado, land district, under the act of March 3, 1877 (19 Stat., 377), as amended by the act of March 3, 1891 (26 Stat., 1095). Final proof thereon was submitted May 8, 1908, and final certificate issued May 13, 1908.

By your decision of November 23, 1908, you required Cole to show that he has actually irrigated and reclaimed all of the irrigable land in his entry. From this requirement Cole appealed to the Department. Your decision was affirmed by departmental decision of June 5, 1909, and a motion for review of said decision has been filed.

Your decision is in harmony with sections 24 and 26 of the circular of November 30, 1908 (37 L. D., 312).

It appears that Cole has cultivated and irrigated as much as one-eighth of the land in his entry and has constructed ditches, owns a sufficient water right, has brought water to the lands, and is prepared to turn water upon the entire tract when it shall have been cleared, but water has not been actually spread over the entire area for the reason, as alleged, that no benefit would accrue from such distribution until the land is cleared and plowed. It is insisted by counsel that no more reason exists under the act as amended for requiring that all of the irrigable area be actually irrigated than there was under the original law. The case of *United States v. McIntosh* (85 Fed. Rep., 333), is cited to show the requirements of the original act in this respect. In said decision the court said:

It was the manifest purpose of Congress to hold out to the citizens of the United States an inducement to reclaim the waste and desert lands of the public domain, and thus render them subservient to the uses of husbandry by process of irrigation. This was to be accomplished by such a system of ditches as would carry to the subdivisions of the land, capable of being reached by the surface flow, a supply of water such as, when let out of the ditches by draw gates or smaller ditches, might spread over the accessible parts, and stimulate vegetable life. If the main ditches were thus constructed, with the acquired adequate supply of water to irrigate the lands for the purpose of cultivation in the ordinary method of carrying it out over the surface of the ground, we think the reclamation contemplated by the statute was accomplished, without showing that this appropriation was followed by actual use and cultivation. This seems to be in accord with recent rulings of the land office department. *Dickinson v. Auerbach*, 18 Land Dec. Dep. Int. 16; *Instructions of Secretary Teller to Commissioner McFarland*, 3 Land Dec. Dep. Int., 385.

This may be considered as properly expressing the character of reclamation required by the original desert-land act. There is nothing contained in the amendatory act of March 3, 1891, which requires a character of reclamation different from that required by the original

act, except that under the amendatory act an expenditure of three dollars per acre must be shown, and one-eighth of the land embraced in the entry must be cultivated and so shown in final proof.

Section 5 of the act as amended contains the following language:

Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: *Provided*, That proof be further required of the cultivation of one-eighth of the land.

Cultivation of desert lands without actual irrigation would be a useless proceeding, and inasmuch as the cultivation of the amount stated is required, it is also necessary that this area must have been actually irrigated by placing water upon it prior to final proof. Beyond this the rule should be as given in the court decision above quoted.

Water in the arid regions is a valuable commodity and its waste by the irrigation of lands unprepared for any agricultural use should not be required as a mere matter of proof that the lands can be watered from the system constructed. As a general rule, water rights in the western States extend only to the amount of water "beneficially used." In fact, the desert-land act itself undertakes to limit the right to use water to the amount "necessarily used;" and as the act requires only one-eighth of the land to be cultivated prior to proof, and if no more than this amount be cultivated, it appears, generally speaking, that the flowing of water over the remaining portion would be unnecessary waste.

If no other objection appear than that noted in said decision, the entry of Cole should pass to patent and it is so directed.

You are further directed to prepare a circular for departmental approval amending the said circular of November 30, 1908, in harmony with the view here expressed.

The former decision in this case is hereby recalled and vacated, and your decision is reversed.

INDIAN LANDS—DECEASED ALLOTTEE—PATENT TO HEIRS—ACTS OF MAY 8, 1906, AND MAY 29, 1908.

JOSEPH BLACK BEAR.

The second paragraph of the act of May 8, 1906, is not mandatory, requiring the Secretary of the Interior to issue patent in fee simple to the heirs of a deceased allottee or to cause the land to be sold for their benefit, at the option of the heirs, regardless of their competency, but vests the Secretary with discretion to issue patent if he find the heirs competent or to sell the land for their benefit if he deem them incompetent.

The latter part of section 1 of the act of May 29, 1908, providing for the issuance of patent to the heirs of a deceased allottee, if competent, or the sale of the land for their benefit in case of their incompetency, is operative in the State of Oklahoma.

First Assistant Secretary Pierce to the Commissioner of Indian Affairs, January 4, 1910. (F. W. C.) (C. J. G.)

An appeal has been filed by Joseph Black Bear, claiming to be sole heir of Edward Black Bear, Apache Indian, who died July 26, 1908, from the decision of your office of August 27, 1909, denying his application under the act of May 8, 1906 (34 Stat., 182, 183), for patent in fee simple on allotment made to said Edward Black Bear, under section 6 of the act of June 5, 1906 (34 Stat., 213, 214).

Said act of May 8, 1906, which is amendatory of section 6 of the act of February 8, 1887 (24 Stat., 388), provides in part as follows:

That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this act shall not extend to any Indians in the Indian Territory.

That hereafter when an allotment of land is made to any Indian, and any such Indian dies before the expiration of the trust period, said allotment shall be cancelled and the land shall revert to the United States, and the Secretary of the Interior shall ascertain the legal heirs of such Indian, and shall cause to be issued to said heirs and in their names, a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers, and pay the net proceeds to the heirs, or their legal representatives, of such deceased Indian. The action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final.

The application of Joseph Black Bear for patent in fee is made under the last paragraph of the above act. Your office held that the power of the Secretary of the Interior under said paragraph is discretionary, *i. e.*, he can direct that a patent in fee issue in the name of the heir or heirs of the deceased allottee, or that the land be sold as provided by law, and furthermore that your office will not recommend the issuance of patents in fee unless the competency of the heir or heirs is clearly shown.

It is urged in the appeal here, as was done before your office, that the language of the last paragraph of the act of May 8, 1906, is mandatory; that it is the duty of the Secretary of the Interior either to issue patent in fee simple to Joseph Black Bear as sole heir of the deceased allottee, or to sell the land as provided by law, the course to be pursued being dependent solely upon the election of the applicant; that the right of Joseph Black Bear to such patent is in no way dependent upon his competency.

There is no doubt that under said paragraph the *sale* of the deceased allottee's land is made discretionary with the Secretary of the Interior, and if the issuance of fee-simple patent to the heir or heirs is not also discretionary, the last paragraph of the act as above quoted was clearly intended to differ materially from the first, wherein as to the land of the living allottee the issuance of patent in fee simple was made discretionary with the Secretary of the Interior, and also dependent upon a showing that the allottee is competent and capable of managing his affairs. No reason is seen why a showing of competency should be required in a case of an applicant for issuance of patent in fee on his own allotment, and no such requirement should be made in the case of inherited land. In law the words "shall" and "may" are often convertible terms. The word "shall" in a statute is not always mandatory or imperative, but very frequently is merely permissive or directory and its use may be entirely consistent with an exercise of discretion. It was undoubtedly used in this latter sense in the last paragraph of the act of May 8, 1906, as clearly shown when said paragraph is read in connection with the preceding paragraph of such act.

Any doubt, however, in this matter is removed by reference to the act of May 29, 1908 (35 Stat., 444), provided the second clause of section one of said act is applicable to Oklahoma. That act may be regarded as superseding the like provisions of the second paragraph of the act of May 8, 1906, except in those States specifically excluded by the act of May 29, 1908, section one of which reads as follows:

That the lands, or any part thereof, allotted to any Indian, or any inherited interest therein, which can be sold under existing law by authority of the Secretary of the Interior, except the lands in Oklahoma, and the States of Minnesota and South Dakota may be sold on the petition of the allottee, or his heirs, on such terms and conditions and under such regulations as the Secretary of the Interior may prescribe; and the lands of a minor, or of a person deemed incompetent by the Secretary of the Interior to petition for himself, may be sold in the same manner, on the petition of the natural guardian in the case of infants, and in the case of Indians deemed incompetent as aforesaid, and of orphans without a natural guardian, on petition of a person designated for the purpose by the Secretary of the Interior. That when any Indian who has heretofore received or who may hereafter receive, an allotment of land dies before the expiration of the trust period, the Secretary of the Interior shall ascertain the legal heirs of such Indian, and if satisfied of their ability to manage their own affairs shall cause to be issued in their names a patent in fee simple for said lands; but if he finds them incapable of managing their own affairs, the land may be sold as hereinbefore provided: *Provided*, That the proceeds derived from all sales hereunder shall be used, during the trust period, for the benefit of the allottee, or heir, so disposing of his interest, under the supervision of the Commissioner of Indian Affairs: *And provided further*, That upon the approval of any sale hereunder by the

Secretary of the Interior he shall cause a patent in fee to issue in the name of the purchaser for the lands so sold: *And provided further*, That nothing in section one herein contained shall apply to the States of Minnesota and South Dakota.

This section includes several classes of persons, the first part having reference to the *sale* of lands only, and authorizing, upon petition, the sale of lands allotted to any Indian or inherited interest therein, as well as lands of minors or of persons deemed incompetent, "on such terms and conditions and under such regulations as the Secretary of the Interior may prescribe." The States of Oklahoma, Minnesota, and South Dakota are excepted from the operation of the first part of the section. The second part has reference only to the lands of deceased Indian allottees and authorizes the issuance of fee simple patents in the names of the legal heirs, provided, after the Secretary of the Interior has ascertained such heirs, he is satisfied of their competency, but if he finds them to be incompetent "the land may be sold as hereinbefore provided." The States excepted in the second part of the section are Minnesota and South Dakota. The proceeds derived from all sales, whether in behalf of allottees or heirs, are to be used during the trust period under the supervision of the Commissioner of Indian Affairs, and upon approval of any sales fee simple patents are to be issued in the names of the purchasers.

"The existing law" at date of the act of May 29, 1908, for the sale of lands allotted to any Indian, or any inherited interest therein, is embodied in the acts of May 27, 1902 (32 Stat., 245, 275), and March 1, 1907 (34 Stat., 1015, 1018), the former providing for the sale of inherited lands of adults' and minors' interests therein, while the latter authorizes the sale of lands belonging to non-competent Indians, either through personal allotments or inheritance. These acts are of general operation, there being no exception of any State or Territory. Under said acts the sale or conveyance is to be approved by the Secretary of the Interior, and when so approved conveys full title, the same as if fee simple patent had issued to the allottees; while under the acts of 1906 and 1908 the Secretary is authorized to ascertain the heirs of deceased allottees and issue fee simple patent in their names, or to the purchasers of their lands in their names, as the case may be. A different method of conveying title was thus provided for in the later acts.

The act of May 8, 1906, authorized the issuance of fee simple patents to competent allottees, and to the legal heirs, in their names, of deceased allottees, or the sale of the lands; but the authorization as to the latter classes extended only to cases where the allotments were made *after* the date of the act. The act of May 29, 1908, covers all classes embodied in the former acts and in the first part of section

one thereof provides for the sale of such allotments, or any inherited interest therein as may be sold under existing law, and in like manner for the sale of the lands of minors or incompetent persons, except lands in the three States of Oklahoma, Minnesota, and South Dakota. The second part of the section is practically the same as the provisions of the act of May 8, 1906, except that it refers to allotments made either before or after the act of May 29, 1908, and is made inoperative in the two States of Minnesota and South Dakota.

It is a familiar rule that statutes should be so construed, if possible, as to give effect to all of their clauses and provisions. In the first part of section one of the act of May 29, 1908, Oklahoma is excepted along with two other States—Minnesota and South Dakota. In the second part only the two States, Minnesota and South Dakota, are excepted. The fair conclusion therefore is that it is intended that the second part should be operative in Oklahoma, especially as the two parts of the section refer to different classes. It does not suffice to attribute the omission to mention Oklahoma among the exceptions in the second part of the section to inadvertence. As said in *Black on Interpretation of Laws*, page 57:

It was a maxim of the old law that "*casus omissus pro omisso habendus est*," that is, that a case omitted is to be held as intentionally omitted. If the statute is sought to be applied to a case or object which is omitted from its terms, but which appears to be within the obvious purpose or plan of the statute, and so to have been omitted merely by inadvertence or accident, still the courts are not at liberty to add to the language of the law; and it must be held that the legislature intended to omit the specific case, however improbable that may appear in connection with the general policy of the statute.

That the omission of Oklahoma in the second part was due to an inadvertence is highly improbable from the fact that if such was not the intention, no exceptions of States would have been made until the end of the section. On the contrary, the exceptions were made in each of the different classes enumerated. The only reasonable conclusion therefore is that it was intended to exclude Oklahoma as to the classes enumerated in the first part of the section and to include that State as to the classes named in the second part. It results that, as to the sale of lands or any part thereof allotted to any Indian or any inherited interest therein, which can be sold under existing law, and the sale of the lands of minors or incompetent persons, the States of Oklahoma, Minnesota, and South Dakota are excepted from the operation of the act. These sales, it will be noted, are to be made upon the petition of the allottee or his heirs, and in the case of minors and incompetents upon petition of the natural guardian or a person designated for the purpose. The second part of the section provides that upon the death of the allottee, the Secretary shall ascertain the legal heirs, and, if found competent, shall issue in

their names a patent in fee simple, but if found to be incompetent "the land may be sold as hereinbefore provided." That is to say, in the manner thereinbefore provided, which is on petition and "on such terms and conditions and under such regulations as the Secretary of the Interior may prescribe." After providing as to the disposition of the proceeds of sale, and for the issuance of patent in fee simple in the name of the purchaser, it was further provided "that nothing in section one herein contained shall apply to the States of Minnesota and South Dakota."

The inevitable conclusion is that section one of the act of May 29, 1908, relates to different classes, and makes two separate and distinct provisions, the first part prescribing the manner in which lands that can be sold under existing law may be sold, except lands in Oklahoma, Minnesota, and South Dakota; the second part authorizing the issuance of fee simple patents to the competent heirs, by names of deceased allottees, after they have been ascertained by the Secretary of the Interior, lands in the two States of Minnesota and South Dakota only being excepted, leaving the second part operative in Oklahoma.

The action of your office herein is affirmed. If the issuance of fee simple patents on lands of deceased allottees in Oklahoma, or the sale of such lands, is not already in accordance with the provisions of the second part of section one of the act of May 29, 1908, such practice should at once be put in force.

INDIAN LANDS—DECEASED ALLOTTEE—PATENT TO HEIRS—ACT OF
MAY 8, 1906.

WAYNE WHITE WOLF ET AL.

An applicant for fee simple patent under the second paragraph of the act of May 8, 1906, as heir of a deceased allottee, is required to show his competency.

First Assistant Secretary Pierce to the Commissioner of Indian Affairs, February 5, 1910. (F. W. C.) (C. J. G.)

Your office transmitted, under date of January 25, 1910, papers in the matter of the applications under the act of May 8, 1906 (34 Stat., 182, 183), of Wayne White Wolf and William Patterson, claiming as sole heirs, for patents in fee simple on allotments made to Martin L. White Wolf and Frank Patterson, Comanche Indians, who died June 11, 1906, and January 19, 1908, respectively.

In support of said applications is filed copy of brief and argument which accompanied the appeal to the Department in the case of

Joseph Black Bear, claiming as sole heir of Edward Black Bear, and in which decision was rendered January 4, 1910 (38 L. D.,—). It was urged in that case that the language of the last paragraph of the act of May 8, 1906, is mandatory; that it was the duty of the Secretary of the Interior either to issue patent in fee simple to Joseph Black Bear as sole heir of the deceased allottee, or to sell the land as provided by said act and pay the net proceeds to the heir, the course to be pursued being dependent solely upon the election of the heir; and that the right of Joseph Black Bear to a patent was in no way dependent upon his competency. Your office held, and the holding was affirmed here, that no recommendation would be made for issuance of patent in fee simple to the heir of a deceased allottee under the act of May 8, 1906, unless the competency of the said heir is shown.

The only distinction between the case referred to and the present ones is that the allottee, Edward Black Bear, died subsequent to the act of May 29, 1908 (35 Stat., 444), while the allottees in the two cases now presented died prior to said act. The second clause of section 1 of that act in terms authorizes the Secretary of the Interior to issue patent in fee simple to the heirs of deceased allottees only upon his being satisfied of their competency to manage their own affairs. The only question as to the act of May 29, 1908, in connection with the Black Bear case was as to whether it was operative in Oklahoma.

The Department held in the Black Bear case that an applicant for patent in fee simple on inherited land should, under the last paragraph of the act of May 8, 1906, be required to show that he is competent, it being stated:

There is no doubt that under said paragraph the *sale* of the deceased allottee's land is made discretionary with the Secretary of the Interior, and if the issuance of fee simple patent to the heir or heirs is not also discretionary, the last paragraph of the act as above quoted was clearly intended to differ materially from the first wherein as to the land of the living allottee the issuance of patent in fee simple was made discretionary with the Secretary of the Interior, and also dependent upon a showing that the allottee is competent and capable of managing his affairs. No reason is seen why a showing of competency should be required in a case of an applicant for issuance of patent in fee on his own allotment, and no such requirement should be made in the case of inherited land. In law the words "shall" and "may" are often convertible terms. The word "shall" in a statute is not always mandatory or imperative, but very frequently is merely permissive or directory, and its use may be entirely consistent with an exercise of discretion. It was undoubtedly used in this latter sense in the last paragraph of the act of May 8, 1906, as clearly shown when said paragraph is read in connection with the preceding paragraph of such act.

It was then stated that any doubt as to the discretionary power of the Secretary of the Interior in the matter was removed by reference to the act of May 29, 1908, it being shown that Edward Black Bear

died July 26, 1908, the only question being, as hereinbefore stated, as to the applicability of said act to Oklahoma. Under the construction placed upon the act of May 8, 1906, the fact that the allottees Martin L. White Wolf and Frank Patterson died prior to the act of May 29, 1908, can make no difference, as, aside from said act, a showing of competency is required on the part of an heir applying under the act of May 8, 1906, for patent in fee simple on a deceased allottee's land.

The applications herein are denied.

DESERT LAND ENTRY—CONTEST—CHARGE OF FRAUD—ANNUAL EXPENDITURES.

WILLIAMS *v.* KIRK.

The fact that the annual expenditures for the benefit of a desert-land entry are made by another, for the entryman, is not sufficient ground for contest, if made in good faith to effect reclamation, and not with a view to indirectly obtaining title to the land.

It is not of itself evidence of fraud, or ground for contest, that a group of desert-land entrymen agree voluntarily to subject their lands to the support of an irrigation system from which water may be taken for their reclamation.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, February 7, 1910. (J. R. W.—J. F. T.)*

Nancy Kirk appealed from your decision of April 5, 1909, canceling her desert-land entry, 983 Ute series, for lot 6, Sec. 14, E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 22, lot 1 and NW. $\frac{1}{4}$, Sec. 23, T. 11 S., R. 101 W., 6th P. M., Montrose, Colorado, on contest of George J. D. Williams.

This is one of thirteen contests of similar entries in one group and vicinity, contests against each of which are disposed of in your decision, but each will be subject of separate decision here, the general principles affecting all the cases being discussed herein.

June 30, 1905, Kirk made her entry, against which Williams filed contest affidavit June 26, 1907, charging:

Said entry is not made by said Kirk for her own use or benefit, but for use and benefit of the Red Lands Irrigation and Power Company, a corporation, or for use and benefit of some officer of said corporation, and that said Kirk has done no work, constructed no irrigation works or ditches, expended no money or labor calculated to reclaim the land embraced in said entry.

Hearing was had before the local office, September 19, 1907, all parties participating in person, aided by counsel. The local office found in favor of contestant, and recommended cancellation of the entry. You affirmed that action. The plat of township survey was filed in Gunnison local office July 21, 1884. The land lies on what is known as the Red Mesa, on Grand River, opposite Grand Junction, west of the mouth of the Gunnison. The group of entries lie on three

benches, or flood plains, of Grand River when flowing at higher elevations. The first bench comprises about 3800 acres, about 130 feet above the present normal stage of water in the river; the second is about 1000 acres, lying 75 or 100 feet higher; and the third is 255 feet above normal stage of water in the river. The land is desert because arid, and in its natural state of no practical value for agricultural purposes. It is, however, very fertile if supplied with waters, adapted to fruit raising and all agricultural uses appropriate to its latitude, is very valuable when water is brought to it, being worth from \$100 to even more than \$1000 per acre when irrigated and brought into efficient cultivation. Various persons at divers times sought to reclaim these lands, but such attempts incurred much expenditure of money, were futile, and the land remained for more than twenty-one years after survey an arid desert.

In the spring of 1905, Frank D. and Benj. F. Keifer, Addison J. McCune, and others initiated a plan for reclamation and irrigation of the Red Mesa by construction of a power ditch from the Gunnison, power plant, pumps, and ditches—estimated to cost about \$50,000. They were later joined by David T. Stone and Robert A. Carr. It was found that the work could not be substantially and practically accomplished for less than \$100,000. It was necessary to raise money from outside sources, and, for that purpose, and to give their works a financial credit basis, it was necessary that the land to be irrigated should be entered by persons who would agree to take water from the works to assure an income. The promoters explained their plan to their friends and relatives and induced them to make entries. Nearly a year after the entries the Red Lands Irrigation and Power Company was incorporated under the laws of Colorado. Its corporate articles were filed May 6, 1906, by the two Keifers, McCune, Stone, and Orr, with a capital stock of \$500,000, in shares of \$100, non-assessable, to exist not to exceed twenty years, with such right of extension and renewal as is provided by the statutes of that State, to be managed by seven directors, including all of the incorporators, and two other persons—Frederick E. Piatt and H. C. Wagner. The objects of this incorporation were, in substance:

To construct, own and operate a pumping and power plant for generating electricity, for general power and commercial use; to operate, manage, control and build canals, ditches, and ditch systems; to furnish and distribute water for irrigation, domestic and manufacturing purposes; to acquire and convey real estate and personal property, franchises, water rights, rights of way and privileges, and do any and all acts necessary and incident to carry out the objects for which said corporation is created, and to contract for delivery of water on or along its line of canal to corporations or individuals for an agreed sum per year and to contract for sale of water rights to be appurtenant to specific tracts of land, but this corporation shall not be or become a common carrier.

The field of operation was to take water from the west bank of the Gunnison in Sec. 35, T. 1 S., R. 1 W., Ute meridian, and convey it northwesterly about sixteen miles.

Before this time the associated parties had expended much money on the irrigation system. For parts of this money the associates took stock and became stockholders; part of their expenditures were applied to credit of the group of entrymen as payment of annual expenditures required by law to be made on their desert-land entries, among which Nancy Kirk was one. The associates also conveyed to the corporation the property created by their expenditures and about 640 acres of patented land on which the main part of the plant was situated, which 640 acres it was also expected to irrigate by said system.

A form of contract between the entrymen of lands irrigable by the project and the irrigation company was drafted by its counsel and submitted to the entrymen whose lands were irrigable from its system. June 18, 1906, Nancy Kirk entered into a contract, called a bond, which, in substance, obligated her, successors or assigns, to pay the irrigation company \$30,500. The condition of this instrument recited that she had filed her declaration to enter as a desert land claim the lands in controversy, and had paid or was about to pay the fees and final purchase price to the United States; that under the statutes it was necessary to her acquisition of title to show seasonable successful cultivation of crops, and to acquire necessary water rights for irrigation of the land, which was so situated that irrigation was wholly beyond her individual power; that the Red Lands Irrigation and Power Company had a system of irrigating canals, pumps, and appliances constructed, or about to be, whereby the land could be successfully irrigated, and had agreed to furnish a good and sufficient water right for irrigation of the land to the full extent required by law to make final proof of reclamation thereof; in consideration of the irrigation company's agreement to furnish water and water rights, the entryman agreed diligently to improve the land by construction of laterals necessary for reclamation of the tracts in full compliance with laws of the United States, and as soon as that could be done to make proof before the proper land office and final payment for acquiring title to the premises, and at said time to pay the irrigation company \$30,500—

or in lieu thereof, on default of said payment at the time of issuance of the receiver's final receipt or other indicia of title from the United States, to convey to the party of the second part [irrigation company], by good and sufficient deed of conveyance, all the above described land, excepting and reserving twenty acres, in a legal compact subdivision.

The condition of the obligation was, that if the irrigation company furnished water for irrigation of the land in manner described, and

Mrs. Kirk improved the land as agreed, paid the United States the sum and fees necessary to acquire title, and paid the irrigation company the sum provided for, or in lieu thereof conveyed to the irrigation company that part of the land therein provided, the obligation was to be void; otherwise in full force and effect. It was also agreed that if Mrs. Kirk failed to comply with conditions of the instrument, the company at its option might sue under terms of the instrument, or might bring action to enforce specific performance of its conditions and agreements for conveyance of the land. The quantity of water was limited to that sufficient for irrigation thereof under ordinary conditions, not exceeding one-half inch per acre for the tract. After compliance with conditions of the bond, annual service charges for water were to be such as the irrigation company elected to assess for maintenance, operation, and depreciation, not exceeding two dollars and fifty cents per acre.

On back of this instrument was indorsed: August 9, 1906, "paid on within contract \$350." This form of contract was used with all the entrymen in those cases in which contests have arisen.

June 20, 1906, the corporation took steps to issue bonds and raise money "on all its corporate property, real, personal, or mixed, now owned or that may hereafter be acquired," to be secured by deed of trust "on all the property of the company, real, personal, and mixed, including property rights, franchises, machinery, and privileges now owned or hereafter acquired pertaining to or anywise relating to its pumping plant and irrigation system * * * its income and profits, and all other property of said company of every name, nature, or description, wherever situate, now owned or hereafter acquired," the money to be used in completing the system. Such money was so used, with other from other sources, and the work was approaching completion when the affidavit of contest was filed, June 26, 1907.

On these facts applying to all the cases, there are made two contentions against the entries: 1st, the bond or contract between entryman and irrigation company was a mere cloak to hide a prior illegal contract, oral or written, to convey all but twenty acres to the irrigation company, wherefore the entry was illegal and must be canceled; 2nd, that the entryman had not complied with the law in expenditure of one dollar per acre on the land during each year after date of entry. The local office and your office sustained both contentions. The questions, then, presented by the appeal are: 1st, whether there is proof of an agreement prior to or after the entry to convey the major portion of the land or any of it to the irrigation company, or to any one; 2nd, whether the entryman in each case had complied with the law in respect to expenditure and improvement.

Before consideration of these contentions it is appropriate to say that in view of the great expenditure in construction of works inci-

dent to the system planned for reclamation of these lands, the actual accomplishment of that purpose and the great increase in value of the land thereby, the case is presented in a different light than would have been presented at time the contract or agreements hereinbefore mentioned were entered into and when the scheme might have been classed as visionary or speculative. No mere suspicion of the good faith of entrymen should be indulged, neither should the large property right created be destroyed or withheld from the entrymen except upon convincing evidence of fraud.

It should also be remembered that these contests were brought before final proof was offered on any one of the entries, and consequently there is no suggestion of actual conveyance of title to any part of the land entered to any one other than the entryman.

Coming to the real controversies and controlling questions, the instrument, called a bond, of June 18, 1906, between Mrs. Kirk and the Red Lands Irrigation and Power Company, is in fact a contract, the substance of which is that in consideration of Mrs. Kirk's agreements, the Red Lands Irrigation and Power Company, in express terms, agrees "to furnish said water and water rights" for "irrigation of said land under ordinary conditions not exceeding in volume one half inch per acre," in consideration of which she bound herself to pay \$30,500, and "at said time pay" to the irrigation company the money. The time of maturity is not clearly fixed and from its context is liable to the construction that payment shall be made at the time of final proof or perhaps not until issue of patent. The more logical construction of this agreement is, that payment was not due until issue of patent, because the water right is made appurtenant to the land and is not a personal one conveyable by the purchaser to anybody, nor applicable by the owner to other land. The time of maturity of this payment is not of much importance. It concerns only the contracting parties. The purchaser or grantee, Mrs. Kirk, had absolute right to demand water service so long as the corporation existed, if she made her payment. Modifying this was the provision that, instead of payment, the purchaser of the water right might convey all but twenty acres of the land to the water company, and have paid up water right for the twenty acres reserved, subject only to an annual charge of two dollars and fifty cents an acre for all the land she might retain.

This is a contract of the water company to furnish water to specific described land to which it was fixed or "appurtenant" at the price of \$30,500 for 320 acres irrigable from its system. It was public land and the water purchaser agreed "to acquire title thereto and at said time to pay" the water company \$30,500, "or in lieu thereof on default of said payment at time of issuance of receiver's final receipt

or other indicia of title from the United States" to convey to the water company all but twenty acres, for which the land-holding purchaser was to have a paid-up water right, subject only to the annual charge of two dollars and fifty cents per acre.

No agreement to convey is implied by this contract, for the option was reserved by the water purchaser for his relief, to be exercised by him. The clause contained patent ambiguity, in that in one part payment was not due until acquisition of "title," which means issuance of patent, but in reservation of the option it was to be exercised at "issuance of the receiver's final receipt or other indicia of title." It was open to contention that option to convey might be exercised at any time before payment, for time of payment was not made of essence of the contract, and there could be no default until after the sum payable became due on acquisition of patent title.

It is obvious from face of the contract that it was not an agreement to convey any part of the land. It showed the required expenditure to time of the contest, though the water right was not fully paid. It was neither a conveyance nor a contract to convey, nor yet a mortgage. But if construed to be an equitable mortgage of all but twenty acres of the land, it was not—as shown in *Hafemann v. Gross* (199 U. S., 345-7) in respect to an express agreement to pay over one-fourth of proceeds of land to be acquired from the United States when sold by an entryman—a violation of the law of the entry as construed by that court or by the land department as shown in many decisions the court cited.

This contract, however, became unsatisfactory to the parties, and September 14, 1907, two days after notice of contest, the water company by a new instrument "sold and conveyed to" Mrs. Kirk a water right for one-third a statutory inch per acre for all irrigable land of her entry, for which she agreed to pay \$100 per acre, less the \$350 paid and credited the former contract, to be paid on or before six months after final proof on the entry, with privilege to pay any sum at any time on the purchase price. The right was not vendible without vendor's consent, nor could be transferred to other land. When fully paid, annual charges of \$2.50 per acre remained a charge for water service. Mrs. Kirk contracted to use diligence in consummating her entry, and the former contract was stated to be abrogated. So far as the record shows, no mortgage or separate instrument of lien in that nature was taken, nor was any in terms written into this conveyance. It appears on its face to be an absolute grant of the right though full payment had not been made.

It is a question at final proof whether the entryman has a water right. In contests for failure of annual proof the question is: Has the required expenditure been made in a way and for a purpose honestly intended to effect reclamation? *Stevenson v. Scharry* (34

L. D., 675, 678). It is objected by contestants that Mrs. Kirk put no improvements on the land and that whatever may have been paid on the water right was not paid from her own funds, but by her brother McCune, if paid in fact.

If this were true, so only the required sum was paid for her, with view to her entry, in a way and for a purpose honestly intended to effect reclamation of her land, the requirement of law is satisfied. The object of the law is to effect reclamation of arid land and make it productive. One may properly aid his kindred or even a friend or person to whom his benevolence, affinity, duty, benignity, or confidence in a promise to repay, moves him, so long as he does not seek indirectly in this way to obtain title. Of these necessary requisites there is no room to doubt. The water company has expended more than three dollars per acre for all the entries within its projected lines, it has credited the necessary sum as paid by or for Mrs. Kirk, the works undertaken were obviously undertaken and money expended in a way and for a purpose honestly intended to effect reclamation of Mrs. Kirk's land, as well as other in that vicinity. In *Bedford v. Clay*, affirmed by the Department (unreported), your office held that:

This office can not seek the source of money expended for purposes of reclamation or determine private interests under indefinite contracts with reference to such work. These are matters for local courts. Sufficient it is if an entryman causes, in good faith, expenditure of the required amount in permanent improvements for the purpose of reclaiming the entered land.

This is the rule applicable. Mrs. Kirk's entry is within it.

Neither water contract being obnoxious to law, nor the entrymen's expenditures inadequate under the law, another question to be considered is if evidence outside the contract shows on part of the entrymen a concealed intent to acquire the land for benefit of the water company or some of its officers. The evidence relied on is that of McLuen, Boyer, Hughes, and Kaiser. McLuen testifies to a conversation between himself and Robert A. Orr, in early spring or late fall of 1905, inviting him to make an entry in this vicinity and to keep the matter private lest the "Mesa County Bank and people interested in another proposition would get hold of it." Hughes, in July, 1905, talked with both Benj. F. and Frank B. Keifer, who then proposed to him to furnish money to enter a tract and pay all expenses if he would deed over 300 acres of 320, they furnishing a water right for that he should reserve, and he applied for an entry with this understanding, but, finding a homestead entry uncanceled, his application was rejected. Boyer testified that June or July, 1905, Frank Keifer wanted him to "file on a piece of land on the Mesa there, and I told him I would like to; then he told me under what grounds they were filing; that I could take a desert-land claim of 320 acres, and

they would furnish money to prove up and give me my pick of twenty acres, with a water right, and it would not cost me only my right." He made no entry. Kaiser testified to a conversation with Robert A. Orr that he (Kaiser) could file on land to be irrigated by the proposed water system, and that he (Kaiser) would not be required to take twenty acres of his entry, but would have twenty acres anywhere within the irrigated area; that Orr urged him to take stock in the Red Lands Irrigation and Power Company, and a copy of the bond or contract of June 18, 1906, was mailed him to be signed by him, or his wife, whichever made entry, but its terms did not suit him, and neither he nor his wife signed it. Both Keifers deny any conversation to the effect stated by Hughes, and give a different version of their proposals to him. Frank Keifer denies the conversation with Boyer. Orr denies any proposition to Kaiser other or different from that offered by the bond or contract of June 18, 1906. None of these conversations or proposals were brought home to Nancy Kirk, nor is it shown that she ever stated that she made entry with intent that her land should inure in any part to benefit of the water company, or any other persons than herself, except as the company would be benefited by her becoming party to the bond of June 18, 1906.

It is argued that as all the entrymen were somewhat nearly connected, a conspiracy may be inferred from proof that those who are alleged to have made the above statements proposed to others to enter into such a conspiracy. No authority is cited, nor is any found by the Department that conspiracy may be inferred contrary to written contracts, where there is no evidence bringing home to the parties immediately accused any knowledge of it as a fact, or assent to it.

That the projectors of the irrigation project should invite their friends into a profitable enterprise is not unnatural, nor suggestive of fraud. That they should invite only their friends was necessary to success of the project itself. The enterprise would necessarily be expensive and without co-operation a failure. The cost would inevitably be great; the amount of land that could contribute to its support was necessarily limited. It was essential to success that every acre capable of irrigation should contribute to cost and maintenance of the enterprise, or failure was certain.

Organization for co-operation is not in itself evidence of conspiracy or fraud. To argue otherwise is destructive to contestant's case. Before beginning the contests, they met secretly at night and cast lots as to which entries they respectively would contest. Jocosely, they say, they severally selected the sites for their homes on the respective tracts the members of their association were about to attack. At that time the enterprise was a visible success, and land that had lain for more than twenty years open to entry, arid and undesired,

had become a fertile garden. They are merely of that class which awakes to seize the opportunity opening when a successful battle had been fought by others with the hostile forces of arid nature—plunderers of the field after others had fought the battle.

One of these contestants, Hampton, testifies that if he succeeds, he intends to take a homestead entry, and not co-operate in support of the irrigation system. He would hold the lands arid, and, if all the entrymen, or contestants if they succeeded, were like him, the irrigation system would necessarily be useless and abandoned. The reclaimed land would become again a desert.

The price of \$100 an acre is said to be conclusive evidence of fraud, because unreasonable. So also is claimed to be the obligation of every entryman, voluntarily assumed, to contribute to the system. In its reclamation projects the United States requires every acre of land under the ditch line to assume this obligation of contribution. Every entryman that seeks public lands under an irrigation system must assume it. This sufficiently refutes the contention that a group of entrymen under a private system conspire to defraud the United States if they voluntarily subject their land to support the system from which water may be taken for their reclamation. In these expensive projects co-operation is essential, and it is the more laudable the more voluntarily and heartily entered into. In the reclamation projects the water charge in gravity systems is as high as \$60 per acre. This too, in reclamation projects, the United States not only makes a lien on the land but requires the entryman to contract with a subsidiary corporation styled a water users association to pay it and to make it a lien on his lands, enforceable as a contract and liable by his default by process of judicial foreclosure to take from him his title. If the contract with the Red Lands Company creates in fact a lien enforceable by judicial foreclosure it is no more objectionable in form than the government imposes and requires of entrymen of lands in its own reclamation projects.

In this project the water has to be pumped 130 feet, and part of it 255 feet, to the lands. This greatly increases cost of such a project over one where water carries itself to the land by gravity. The price of \$100 per acre on highly fertile land in a favorable latitude, thereby made worth \$300 to even more than \$1000 an acre, can not be held so great a charge that rational persons, in good faith desiring a home, or even a farm, would not agree to pay it. If one by paying a hundred dollars and a dollar and a quarter an acre can obtain a farm of one hundred and sixty acres worth \$300 per acre, it is not an unwise bargain—nor is it proof of conspiracy, that he agrees to pay that sum. The facts comport with good faith, honesty, and fair dealing. No provision of the desert land act, or of any other principle of law cited or found by the Department, would justify the cancellation of these

entries, where the entrymen have actually reclaimed the land and made a desert productive of food for man and beast in great abundance.

The conclusion here reached merely disposes of the contest and is not intended to give effect to any illegal contract or understanding, either through the agreements hereinbefore referred to or to any private understanding aside from or under them. In passing upon proofs which have been or may be offered on these entries you will be free to make such investigation as is necessary respecting such matters, so that it may be satisfactorily shown that the law has been fully complied with and in no respect evaded or violated.

Your decision is vacated, the contest is dismissed and the entry will remain intact. The papers are herewith remanded for such further proceedings upon the final proof submitted or otherwise as may be necessary or advisable.

**DESERT LAND ENTRY—ASSIGNMENT—CONTEST—ACT OF MARCH
26, 1908.**

HARRINGTON *v.* PATTERSON.

The desert-land right under the acts of March 3, 1877, and March 3, 1891, is exhausted by either making or taking by assignment an entry for 320 acres. Where one who had exhausted his right by taking an entry by assignment was nevertheless permitted to make another entry in his own name, it may be permitted to stand if within the provisions of the act of March 26, 1908, authorizing second desert entries, notwithstanding a pending contest charging disqualification at the time the entry was made.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, February 8, 1910.* (J. H. T.)

March 8, 1905, Rome T. Perry made desert-land entry for the N. $\frac{1}{2}$, Sec. 19, T. 14 S., R. 14 E., S. B. M., now serial No. 02144, Los Angeles, California.

January 11, 1908, Edward W. Harrington filed contest affidavit against the said entry, and it is stated that notice issued thereon, setting May 4, 1908, as the date for hearing. Neither the said affidavit nor the notice is found with the record. You state that the contest affidavit alleged—

that said Rome T. Perry had already exhausted his rights under the desert-land act, by reason of having taken assignment on March 14, 1901, to desert-land entry No. 1395, filed February 27, 1901, by Nacey M. Martin for N. $\frac{1}{4}$ NE. $\frac{1}{4}$ and lots 4 and 5 of Sec. 19 and lots 1, 2, and 3 N. $\frac{1}{2}$ NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 20, T. 17 S., R. 14 E., S. B. M. That therefore said Rome T. Perry's entry of said N. $\frac{1}{2}$, Sec. 19, T. 14 S., R. 14 E., S. B. M., is illegal.

February 13, 1908, the local officers denied the application to contest for the following reason:

Because an assignment of a desert-land entry to one disqualified to acquire title under the desert-land law does not render the entry fraudulent, but leaves the title thereunder still in the entryman (28 L. D., 497).

The reason assigned by the local officers for the action taken has no proper application to the state of facts alleged.

April 6, 1908, Perry assigned the entry to Henry M. Patterson, who has since made final proof, showing reclamation of the land.

October 29, 1908, you reversed the action of the local officers and directed that hearing be had upon the contest affidavit.

February 11, 1909, on review, you vacated the prior order and directed dismissal of the contest. In said decision you referred to the case of Ida Lundquist (37 L. D., 149), and said:

It would appear from the files and records of this office that prior to the decision in the aforesaid Lundquist case, the practice had been to permit an entry and an assignment or assignments, provided the amount acquired did not exceed 320 acres; and as Perry did not acquire title to the tracts which he took by assignment, as he had parted with all his interest therein prior to making his entry, it must be held that under the practice then existing he was entitled or authorized to make the entry now under contest.

From this last decision appeal has been filed by Harrington.

The Department has never recognized the practice which you state has obtained in your office, as indicated above, and such rule would be contrary to law as interpreted in the case of Lundquist, *supra*.

The original desert-land act of March 3, 1877 (19 Stat., 377), provides that no person shall be permitted to enter more than one tract of land.

The act of March 3, 1891 (26 Stat., 1095), provides that—

No person or association of persons shall hold by assignment or otherwise prior to issuance of patent more than 320 acres of such arid or desert lands.

A person by making such entry for 320 acres, or by holding one of that area under assignment, exhausted his right.

In section 15 of the desert-land circular of November 30, 1908 (37 L. D., 312), it is stated:

The act of March 28, 1908, also provides that no person may take a desert entry by assignment unless he is qualified to enter the tract so assigned to him. Therefore, if a person has made an entry in his own right, he can not thereafter take an entry by assignment, notwithstanding the fact that the area of the two entries combined may not exceed 320 acres.

The language of the act indicates that the taking of an entry by assignment is equivalent to the making of an entry, and this being so, no person is allowed to take more than one entry by assignment. The desert-land right is exhausted either by making an entry or by taking one by assignment.

However, under the practice recognized by the General Land Office, where assignments were taken of more than one entry or where a person made an entry and also took one or more entries by assignment, the aggregate area of the land embraced in all such entries not exceeding 320 acres, such assignments and entries will not be disturbed. But all assignments and entries made subsequent to the approval of the act of March 28, 1908, must be governed by the terms of that act, which is held to mean that the desert-land right is exhausted either by making an entry or by taking one by assignment.

Counsel for contestees in support of their contention that Perry was not disqualified to make the said entry quote from your decision of January 13, 1909, in the case of Andrew E. Tomason, assignee of Dickey Henderson, wherein you say, in reference to the above instructions, the following:

The object of the paragraph aforesaid of the desert-land circular approved November 30, 1908, was to confirm the practice recognized for years by this office in regard to assignments of desert-land entries prior to the approval of the act of March 28, 1908. Under the said former practice of this office, a person who had made a desert-land entry for approximately 320 acres, and relinquished 80 acres thereof, could be allowed subsequently to take another desert-land entry of 80 acres by assignment. It was considered that the main object of the desert-land acts was to encourage and cause the reclamation of lands from the desert; and upon this principle was built the theory that, though any one person could make but one desert-land entry, still any one person could take any number of desert-land entries by assignment, with the one limitation only that such person had not acquired title to, nor did he claim at one time under any of the agricultural public land laws, an amount of land which would exceed in the aggregate 320 acres, except it might be for lands entered or settled upon by him prior to August 30, 1890.

Said circular expressed and adopted the practice which had obtained in your office, as then understood by the Department, but it was not intended to go to the extent expressed in your decision above quoted, and it is not believed that such construction could properly be given the language used in said circular. The Department has never recognized a person placed in the condition of Perry at the time he made this entry as being qualified to make desert-land entry, and he can not be so recognized, and the entry must be canceled, unless it can be shown that he was, when he assigned to Patterson, entitled to the benefit of the second desert-land entry act of March 26, 1908 (35 Stat., 48). Said act reads as follows:

That any person who prior to the passage of this act has made entry under the desert-land laws, but from any cause has lost, forfeited, or abandoned the same, shall be entitled to the benefits of the desert-land law as though such former entry had not been made, and any person applying for a second desert-land entry under this act shall furnish the description and date of his former entry: *Provided*, That the provisions of this act shall not apply to any person whose former entry was assigned in whole or in part or canceled for fraud, or who relinquished the former entry for a valuable consideration.

It is admitted by counsel for contestees that Perry held by assignment the entry, as alleged, which was subsequently relinquished by him in two separate portions at different times prior to the time of making the entry now involved.

The assignment to Patterson was made by Perry long after the filing of the charge against the entry and proceedings thereunder, and Patterson must be charged with notice thereof. He can not therefore be considered as having greater rights under the entry than Perry had. However, a further question is to be considered. If it

could be shown that the former entry held by Perry, as assignee, was relinquished by him without valuable consideration, and that he was, when he assigned to Patterson, in all respects qualified to make second entry under the said act of March 26, 1908, would this contest, having been filed prior to said act, defeat the right of Perry or his assignee to invoke the benefit of the act as applying to this entry? Said act is remedial in character.

Remedial statutes are to be liberally construed; and if a retrospective interpretation will promote the ends of justice and further the design of the legislature in enacting them or making them applicable to cases which are within the reason and spirit of the enactment, though not within its direct words, they should receive such a construction provided it is not inconsistent with the language employed. [Black on Interpretation of Laws, 261.]

It was stated in the case of *Strader v. Goodhue* (31 L. D., 138), that—

The preference right is not a right vested until a contestant has "contested, paid the land office fees, and procured the cancellation" of the entry attacked. This is the plain wording of the acts of May 14, 1880 (21 Stat., 140), and July 26, 1892 (27 Stat., 270). The contestant's preference right is in the nature of a reward offered to an informer. The general rule as to the vesting of right under such statutes accords with the plain wording of this statute—viz: that the right does not become vested until judgment, and may be cut off (1) by a repeal of the statute (*United States v. Connor*, 138 U. S., 61); (2) by a pardon (*United States v. Harris*, 1 Abbott, U. S., 110; *United States v. Lancaster*, 4 Wash., U. S., 64; *Brown v. United States*, 1 Wool., U. S., 198); or by remission of the penalty by competent authority pending the proceedings (*United States v. Morris*, 10 Wheat., 246).

In the case of *Raney v. Burnett* (36 L. D., 2), the Department held (syllabus):

The act of March 2, 1907, amended the act of April 28, 1904, to permit persons who made entry between April 28, and June 28, 1904, to make additional entry in the same manner as those who made entry prior to April 28, "subject to existing rights;" and where an additional entry under section 2 of the act of April 28, based upon an original entry made between the dates mentioned in the amendatory act, was prior to the date of that act held for cancellation, upon contest, on the sole ground that it was invalid because based upon an original entry made subsequently to the passage of the act of April 28, the additional entry will be held intact, the invalidity being cured by the amendatory act and the rights of the entryman being superior to those of the contestant.

In the case of *Emblen v. Lincoln Land Company* (184 U. S., 660), it was found and held that (syllabus):

While a contest over a preemption entry was pending, Congress passed an act confirming the entry and directing the patent to issue, which was done. *Held*, That the act was within the power of Congress, and that its operation could not be defeated by a contestant who had never made an entry on the land, nor perfected the right to do so.

In view of the above, the Department is of the opinion that it will be competent for the contestees in this case to show the qualifications

of Perry under the said act of March 26, 1908, and that if such facts shall be established, the contest must fail. This will be a matter of defense and the burden of proof will be upon the contestees. Upon the admissions already in the record, the contestant has a *prima facie* case, and in view thereof no hearing will be necessary unless contestees desire to invoke the said second entry act. They will therefore be allowed thirty days from notice hereof within which to file in the local land office an affidavit showing the qualifications of Perry under said act, and if such be done a hearing will be ordered for the taking of testimony, of which all parties will be notified. If the contestees fail to furnish the affidavit within the time required the entry will be canceled and Harrington awarded preference right of entry.

If as a result of the contest the present entry should be canceled and Harrington awarded a preference right of entry and he should fail to assert same and make entry within proper time, Patterson, who has made final proof showing reclamation of the land, will be afforded opportunity to make entry thereof provided he shows proper qualifications.

Your decision is accordingly reversed.

SOLDIERS' ADDITIONAL RIGHT—ASSIGNEE—NOTICE OF CLAIM.

NELLIE J. HENNIG.

In order to charge the land department with notice of his claim, an assignee of a soldiers' additional right must assert the same by application to locate or in some other proper manner; and the fact that such claim may be disclosed by examination of the record of a closed case, is not sufficient to charge the land department with notice thereof.

First Assistant Secretary Pierce to the Commissioner of the General
(W. C. P.) *Land Office, August 26, 1909.* (E. F. B.)

Nellie J. Hennig, who claims to be the owner of the soldiers' additional homestead right of James H. Schouten, has appealed from the decision of your office of July 8, 1908, and May 13, 1909, rejecting her application to make entry of the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 20, T. 6 S., R. 8 E., Bozeman, Montana, under said right.

Her application was rejected for the reason that prior to the filing of the same the soldiers' additional homestead right of Schouten had been fully satisfied and exhausted by the allowance of two entries made under an assignment by James H. Schouten to Wm. E. Moses, upon which patents had issued.

James H. Schouten, who was entitled to a soldiers' additional homestead right for 49.22 acres under section 2306, Revised Statutes, executed a power of attorney June 26, 1875, in which his wife joined,

constituting and appointing Charles D. Gilmore his attorney in fact to locate his soldiers' additional homestead right with power to sell, and in consideration of the sum of \$100 paid by said attorney the power was made irrevocable and all claim to the proceeds of the sale of the land located under said right was released to said attorney. There was also a release by the wife of all claim to dower in the land located and of all right and interest growing out of said additional right.

Under said right an entry was made October 1, 1875, of eighty acres of land in the name of James H. Schouten, cash being paid for the excess acreage. No final certificate was issued upon said entry, but Gilmore, acting under the power conferred, sold the land to Alvinza Hayward, October 14, 1875, from whom, through mesne conveyance, all rights under such sale were acquired by the Sierra Lumber Company.

Said entry was canceled April 15, 1895, for reasons not material to the issue involved herein. February 5, 1900, the Sierra Lumber Company applied for reinstatement of said entry, which was denied by decision of your office of October 10, 1900, in which it was stated:

As an entry of the soldiers' additional right of Schouten has never been perfected, it appears that the Sierra Lumber Company may properly, as the assignee of said Schouten, apply to enter the same, to the extent of 49.22 acres upon any of the public lands now subject to entry, relying upon the papers on file herein to support such application and authorize its allowance.

The decision of your office denying the reinstatement of the entry was affirmed by the Department April 13, 1901 (30 L. D., 547), and while no expression was therein made as to the right of the Sierra Lumber Company to enter other lands under said right as assignee of Schouten, it was stated that:

Whatever rights were acquired by said additional entry passed to and became vested in the Sierra Lumber Company, in so far as such conveyances and proceedings could transfer an interest in Government land upon which final payment had not been made.

March 4, 1901, James H. Schouten assigned to William E. Moses, all his right, title and interest in and to his soldiers' additional homestead right, executing therewith an affidavit that he had never exercised said right or sold or transferred it to any one.

Moses assigned 40 acres of said right to John W. Kinzel, November 9, 1901, and 9.22 acres to George Ferguson, March 31, 1903. Entries were made under those assignments for the full quantity of the right, and patents were issued thereon January 27, 1903, and April 8, 1904, respectively.

July 18, 1906, N. P. Chipman, who had succeeded to whatever right may have been acquired by Gilmore under the power of attorney executed by Schouten June 26, 1875, assigned said right to F. W.

McReynolds, August 9, 1906. McReynolds assigned 40 acres of said right to Nellie J. Hennig, who on January 7, 1907, filed her application to make entry under said right of the tract heretofore mentioned. Her application was rejected by your decision of July 8, 1908, for the reason that whatever right was acquired by the attorney in virtue of said power had passed to the grantee of the entryman of the land located thereunder and who was holding under said conveyance at the time of the cancellation of the entry. That was the Sierra Lumber Company. It was rejected upon the further ground that the right had been satisfied by the entries made under the assignment to William E. Moses by Schouten, March 4, 1901.

A motion for review of said decision was filed by appellant, who filed in connection therewith a transfer and assignment by the Sierra Lumber Company to N. P. Chipman, all its right, title and interest in said additional right executed December 1, 1908.

You denied the motion by decision of May 13, 1909, upon the ground that—

If, as is claimed, the legal right to said claim was in Chipman at the date of the office decision quoted, October 10, 1900, it must be held that Chipman by delaying for nearly six years in asserting same and thus permitting another with apparent good title to assert the right and procure patent thereon is guilty of laches, and as between him and his transferees and the Government the right is satisfied by the patents already issued.

The decisions of the Department in the cases of Henry Walker (25 L. D., 119), and Lorenzo D. Chandler (Ib., 205), cited in your decision, are authority for your ruling.

Those decisions rest upon the principle, as stated in the case of Walker, that—

The Department cannot, in any case where it appears that additional entry has already been allowed for lands to which the soldier was entitled, thereafter recognize any claim by a purchaser from the soldier of his additional right, who purchased prior to the allowance of the entry, but of which purchase the land department had no notice when the entry was made.

Such notice, however, must consist of an assertion of claim to make entry under said right either by an application to enter or some action of the land department in some manner involving the assertion or validity of such claim.

A mere expression of opinion in a decision not involving an application or assertion of a claim to exercise such right, or the presence of a transfer in the record of some case involving a former entry under such right would not be notice.

It cannot be expected of the officers of the land department that they will keep in mind the contents of the records of cases disposed of, or to make search of the vast mass of such records running through a long series of years every time an application is made to enter under such rights, in order that it may ascertain whether the soldier had

made a previous transfer of such right, unless attention is specially called to it.

A duty devolves upon every person claiming a right to enter public lands to assert such claim in a proper manner before the land department. That duty can not be avoided by charging the officers of the land department with notice of what may be disclosed by examination of the record of closed cases.

The duty of these officers will be performed if these matters receive proper attention when an attempt is made to make entry of land under the additional right. Until then, the transfer does not concern them. [D. H. Talbot, 30 L. D., 39, 40.]

But independently of this the contention of appellant that she purchased said right upon faith in the expression contained in your decision of October 10, 1900, is not sustained by the record. That expression was to the effect that "it appears that the Sierra Lumber Company may properly as the assignee of Schouten" make entry under said right. So far as appears from the record appellant did not purchase the right from any one claiming under the Sierra Lumber Company, but under an assignment through McReynolds from Chipman, who did not acquire the right from the Sierra Lumber Company until December 1, 1908.

Your decision is affirmed.

SOLDIERS' ADDITIONAL RIGHT—POWER TO LOCATE—ASSIGNMENT—NOTICE.

NELLIE J. HENNIG (ON REVIEW).

Where a soldier entitled to an additional right executed a power to locate the same, at a time when the assignability of such rights was not recognized, and no claim under the power was asserted, by application or other proper manner, within a reasonable time after the land department took action amounting to a recognition of such powers as equitable assignments, and the soldier subsequently executed an assignment of the right to another, under which entry was allowed, the land department is without authority to permit a further entry upon the same right, by one claiming under the power, notwithstanding the existence of the power might have been disclosed to the land department, prior to the allowance of entry under the subsequent assignment, by examination of its closed records in another case.

First Assistant Secretary Pierce to the Commissioner of the General (O. L.) Land Office, February 9, 1910. (J. R. W.)

Nellie J. Hennig, assignee of James H. Schouten, filed motion for review of departmental decision of August 26, 1909 (38 L. D., 442), rejecting her application to make soldiers' additional homestead entry for SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 20, T. 6 S., R. 8 E., Bozeman, Montana.

Her application was denied, because, before its presentation, Schouten's right was fully satisfied by allowance and patent of two entries made under assignment of the same right by Schouten to William E. Moses.

Schouten had an additional right of 49.22 acres under section 2306 of the Revised Statutes. June 26, 1875, he gave Charles D. Gilmore, for consideration of \$100, acknowledged to be paid, power of attorney, stated to be irrevocable, to locate the right and to sell the land located, releasing the consideration that might be received to Gilmore. October 1, 1875, entry of eighty acres was made in Schouten's name and cash paid for the excess. No final fees were paid nor was certificate given, but Gilmore under his power, October 14, 1875, deeded the land to Alvinza Hayward, and by mesne conveyances claim under the entry came to the Sierra Lumber Company. April 15, 1895, the entry was canceled for failure, after notice, to approximate the area to that of the right. The company, February 5, 1900, applied for reinstatement, which, October 10, 1900, you denied, and stated that:

As an entry of the soldiers' additional right of Shouten has never been perfected, it appears that the Sierra Lumber Company may properly, as assignee of said Shouten, apply to enter the same to extent of 49.22 acres upon any public lands now subject to entry, relying on the papers on file herein to support such application, and authorize its allowance.

Your decision was affirmed April 13, 1901 (30 L. D., 547), without express recognition of the company's right to enter other land, but stating that—

Whatever rights were acquired by said additional entry passed to and became vested in the Sierra Lumber Company, in so far as such conveyances and proceedings could transfer an interest in Government land upon which final payment had not been made.

March 4, 1901, Shouten assigned to Moses all his additional right, making affidavit he had never exercised it, or sold or transferred it to any one. Moses assigned forty acres to John W. Kinzel November 9, 1901, and 9.22 acres to George Ferguson March 31, 1903. Entries were made thereunder for the full quantity, and patents, respectively, issued January 27, 1903, and April 8, 1904.

December 1, 1908, the Sierra Lumber Company assigned whatever interest it had in Shouten's right to N. P. Chipman. Before that time, July 18, 1906, Chipman, claiming that he had succeeded to Gilmore's right under Shouten's power of June 26, 1875, assumed to assign the right to F. W. McReynolds, who, August 9, 1906, assumed to assign forty acres of the right to Hennig, who, January 7, 1907, applied to enter the tract in question, which you rejected July 8, 1908, for two reasons: (1) that whatever right Gilmore acquired

by the power passed by the conveyances of the land to the grantee holding under the entry at time of its cancellation—the Sierra Lumber Company; and (2) that Schouten's right was satisfied by the entries made under Schouten's assignment to Moses, March 4, 1901. Chipman then procured and filed the Sierra Lumber Company's assignment of December 1, 1908, above mentioned, and Hennig moved for a review, which you denied, May 13, 1909, on ground of delay in asserting the right for nearly six years, during which another with apparent good title asserted the right and obtained patent.

The Department affirmed your decision upon authority of decisions in *Henry Walker* (25 L. D., 119), and *Lorenzo D. Chandler* (id., 205), cited by you. These decisions hold that where an additional entry has been properly allowed, the claim of a prior purchaser of the right will not be recognized where the land department had no notice of it by an application for entry or by such assertion of the right as called for some action of the Department respecting validity of the claim.

The motion urges that the land department had notice of ownership by the Sierra Lumber Company, from its own records, at time the entries under the assignment to Moses were allowed. In view of the Department there are two sufficient answers to this contention:

First. The papers in entry by the Sierra Company were not on their face an assignment of right. They were only power to locate; and, being only a power, was revocable. At the time it was given, the right was not recognized as assignable. It was not until decision in *Webster v. Luther*, May 18, 1896 (163 U. S., 331), more than twenty years after Schouten's power to Gilmore, that the right was recognized as assignable. It was merely for convenience of administration that, after such decision, the land department was constrained to recognize such powers as in fact, presumably, equitable assignments of the right itself. This was first recognized by the land department February 12, 1898, in *C. W. Darling* (26 L. D., 192). Had the Sierra Lumber Company, or Chipman by assignment from it, seasonably asserted a right as assignee of Schouten by virtue of such power, the power might, and probably would, have been recognized as an equitable assignment. The Sierra Lumber Company, however, did not until its assignment to Chipman, December 1, 1908, assert it to be an assignment. Chipman, without apparent right in him, did so assert it July 18, 1906, and the first notice of such claim to the land department was January 7, 1907, when Hennig asserted a right of entry under Chipman's assignment. Until December 1, 1908, Chipman was stranger to Schouten's right, over which he had never held any power, nor had the claim of title founded on Gilmore's location of it ever come to or passed through him.

Before disclosure or even assertion of any claim in or by Chipman. March 4, 1901, Schouten assigned to Moses, under which Kinzel and Ferguson made entries, and patents issued January 27, 1903, and April 8, 1904, without any notice whatever of claim of right in Chipman or in Hennig or any one under Chipman. To that time no one claimed that Schouten's power to Gilmore, made June 26, 1875, was anything more than on its face it professed to be—a mere power. As a power it was revocable, even though it gave the agent an interest in the land that might be located under it. *Taylor v. Burns* (203 U. S., 120). Schouten's later assignment of the thing or right itself to Moses was of itself a revocation of the power, which no one was asserting to be more than a power. As no one asserted it to be other than a mere power, the land department had ample reason to accept it as such and to satisfy the right, as it did. The decisions in *Henry Walker* and *Lorenzo D. Chandler, supra*, were ample authority for so doing. For six years after the decision in *Webster v. Luther* no one asserted the power to be an equitable assignment, and after patenting of those entries in faith of Schouten's assignment revoking his former power, it was too late for valid assertion of an equitable assignment, or of latent, unasserted, and neglected rights. As was said by the court in *Moran v. Horsky* (178 U. S., 205, 208) :

One who, having an inchoate right to property, abandons it for fourteen years, permits others to acquire apparent title, and deal with it as theirs, and as though he had no right, does not appeal to the favorable consideration of a court of equity. . . . a neglected right, if neglected too long, must be treated as an abandoned right which no court will enforce. . . . There always comes a time when the best of rights will, by reason of neglect, pass beyond the protecting reach of the hands of equity.

Chipman's right, if he had any, was latent. The right of the Sierra Lumber Company arose from an instrument purporting to be a mere power. If it was ever intended to be anything more than a power, it was such only by equitable implication from the unexpressed intent of the parties, made twenty years before any such effect was recognized or permitted. Many such powers on files of the land department were never claimed to be more than mere powers, obtained on promise to pay the consideration, if, and as soon as, patent issued, but never paid in fact, the powers being abandoned if patent did not issue. If more than a mere power was claimed to be the intent and effect of this instrument, it behooved the one claiming under it to assert that fact seasonably and before the United States satisfied the right to some other claimant.

Second. The other answer to movant's contention is set forth at length in departmental decision in *C. L. Hood* (34 L. D., 610, at pages

611 to 613), which fully covers the present case. The executive department has authority to grant but one area of land of 49.22 acres. That being granted to assignee of Schouten, the executive is without power.

Title to Schouten's additional right was not adjudged to be in the Sierra Lumber Company by the decision of April 13, 1901 (30 L. D., 547). It was not then in question. What was before the Department was a motion to reinstate an entry canceled for excess of area over area of the right on which it was based. The question was one of approximation of the area of an entry to that of its base, not that of ownership of the base or additional right. The Department had no reason to decide ownership of the right and did not assume to decide it. It said *arguendo* that whatever was acquired in the land entered had by the mesne conveyances become vested in the Sierra Lumber Company, so far as such conveyances "could transfer an interest in public lands upon which final payment had not been made." The question decided was one of approximate equal area—viz., that eighty acres could not be entered under a right for but 49.22 acres.

Not until application by Hennig was anything pending in the land department calling for its action as to ownership of Schouten's right. The land department will not concern itself about transfers of, ownership, or traffic in soldiers' additional rights until they are sought to be located. It was held in D. H. Talbot (30 L. D., 39, 40) that:

These transfers are not required to be noted on the records of the land department and are not subject to approval or supervision of its officers, nor can such officers, for the purpose of protecting the transferee against other prior or subsequent transfers by his transferer, or for the purpose of enabling the transferee to more advantageously dispose of the additional right, stop other necessary work, every time such a right is claimed to have been transferred, and inquire whether the right has been theretofore exercised and exhausted, or whether the transfer is genuine and absolute. The duty of these officers will be performed if these matters receive proper attention when an attempt is made to make entry of land under the additional right. Until then the transfer thereof does not concern them.

This case is not like that of Herman Dierks (33 L. D., 362), cited by counsel. Dierks, assignee of Frazier's right, applied for entry March 13, 1901, which reached your office early in April and was pending when Frazier's final proof was submitted on his amended Durango, Colorado, entry, where he wrongfully exercised the same right, and your office erroneously approved his final proof and issued patent January 17, 1902, twenty-one months after full notice of Dierks's ownership of the right, during which time the two adverse assertions of the same right were pending together. The United

States had not merely notice, but remedy. Patent should have been denied Frazier, and when issued by mistake the United States could have proceeded for its cancellation. In this case, claim of the Sierra Lumber Company to hold the right as assignee was not asserted until December 1, 1908, when it assigned to Chipman, nor had Chipman or any one asserted in the land department any right, save a power, until after patents issued on Schouten's assignment.

It is suggested that the rulings in 1 Lester's Land Laws, 612 and 622, the case of Charles D. Mousso, 22 L. D., 42, and Opinions Attorney-General, Vol. 2, 501, Vol. 4, 298, and Vol. 8, 377, are inconsistent herewith.

In Lester, Vol. 1, 612, 622, it was held, March 20, 1852, that if two land warrants are issued erroneously to the same party, both must be respected; January 19, 1860, that where a land warrant issued erroneously for one hundred and twenty acres, when the right was for but eighty acres, and had come to an innocent party for value, it must be respected for the full amount; and January 21, 1860, that if a land warrant and duplicate issue for the same service, both must be respected. These rulings were fully considered and discredited in Andrew M. Turner (34 L. D., 606, 608-10), explained by instructions, 36 L. D., 11. They are not well founded and are not longer authority.

In Mousso's case land scrip was due him, but on a forged application scrip was issued and delivered to one Chapman, was located, and the land patented in 1864 and 1866. After thirty years' absence in the south, from June, 1855, to 1885, Mousso claimed issue of scrip to him, and upon opinion of the Assistant Attorney-General for this Department it was allowed. This case is within the principles announced in *Moran v. Horsky*, Andrew M. Turner, and C. L. Hood, *supra*, and is by them discredited.

The case of William S. Hawkins, 2 Opinions Attorney-General, 501, was where a bounty land warrant issued to an imposter, who personated the proper claimant. The facts are meagerly stated, and it does not appear that the true claimant did not assert his right within time that the Government could protect itself by caveat against the warrant. The face of the opinion does not show Hawkins guilty of laches, or that the United States lost thereby.

The opinions, 4, 298; 5, 183; and 8, 377, relate to erroneous payments at the Treasury of liquidated demands made to persons other than those entitled to them. They are to the effect that such erroneous payments do not justify refusal to pay the true owner. These cases arising on payments of Treasury warrants can hardly have involved any question of laches by delay of the warrantee to present his warrant, and are not applicable to the present case.

The motion is denied.

EXTENSION OF TIME FOR ESTABLISHING RESIDENCE—LEAVES OF ABSENCE.**INSTRUCTIONS.**

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 10, 1910.

REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES,
*North Dakota, South Dakota, Idaho, Minnesota, Montana,
Nebraska, Colorado, Wyoming, and New Mexico.*

GENTLEMEN: The following instructions are issued for your guidance in the administration of the act of Congress approved January 28, 1910, "extending the time for certain homesteaders to establish residence upon their lands" (Public—No. 23), a copy of which is attached hereto.

The first section of the act applies to all homestead entries in the States named made after June 1, 1909, and in such cases the entrymen are given until May 15, 1910, to establish residence on their claims. It also applies to soldiers' declaratory statements filed in the States named after June 1, 1909, and such declarants are given until May 15, 1910, to make their homestead entries and establish their residence on the land. If any payment is required to be made in connection with the entry under the declaratory statement, as in the case of ceded Indian reservations, the act also operates to extend the payment until the entry is made.

The first proviso to section 1 of the act provides that the period of commutation or of actual residence under the homestead law shall not be shortened. Entrymen who have taken advantage of this extension can not submit commutation proof until they have maintained substantially continuous residence for fourteen months from the date same was established; and in five-year proof can not claim credit for constructive residence for more than six months prior to the date actual residence was established.

Under the second proviso of section 1 the act will not be held to defeat the adverse claim of one who had made entry over a soldier's declaratory statement, and who prior to the passage of the act had established a bona fide residence on the land entered, where the six months from date of the declaratory statement had expired prior to the passage of the act without the soldier having made his homestead entry and established his residence on the land.

The second section of the act grants a leave of absence for three months from January 28, 1910, to all homestead entrymen or settlers in the States named in the first section of the act. Entrymen who avail themselves of this leave of absence can not claim credit for residence during the time they are absent under such leave, such period

of absence being simply eliminated from consideration in cases of either final or commutation proofs.

Very respectfully,

S. V. PROUDFIT,
Acting Commissioner.

Approved:

R. A. BALLINGER,
Secretary.

[PUBLIC—No. 23.]

An Act Extending the time for certain homesteaders to establish residence upon their lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons who have heretofore made homestead entries in the States of North Dakota, South Dakota, Idaho, Minnesota, Montana, Nebraska, Colorado, and Wyoming, and the Territory of New Mexico, where the period in which they were, or are, required by law to make entry under declaratory statement or establish residence expired or expires after December first, nineteen hundred and nine, are hereby granted until May fifteenth, nineteen hundred and ten, within which to make entry or establish residence upon the lands so entered by them: *Provided*, That this extension of time shall not shorten either the period of commutation or of actual residence under the homestead law: *Provided further*, That this Act shall not apply to an adverse claim established by entry and residence after the expiration of the time allowed for establishing residence of the first entryman, and prior to the passage of this Act.

SEC. 2. That homestead entrymen or settlers upon the public domain in the States above named are hereby granted a leave of absence from their land for a period of three months from the date of the approval of this Act: *Provided*, That the period of actual absence under this Act shall not be deducted from the full time of residence required by law.

Approved, January 28, 1910.

WALTER HOLLENSTEINER.

Motion for review of departmental decision of November 27, 1909, 38 L. D., 319, denied by First Assistant Secretary Pierce, February 10, 1910.

CLASSIFICATION AND VALUATION OF COAL LANDS.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GEOLOGICAL SURVEY,
Washington, D. C., February 10, 1910.

THE HONORABLE,

THE SECRETARY OF THE INTERIOR,

SIR: In the regulations regarding the classification and valuation of coal lands, approved by you on April 10, 1909 (37 L. D., 653), a

minimum thickness of 14 inches of coal, exclusive of partings, is fixed for classes "A," "B," and "C," and a minimum of 36 inches for class "D." In some of the western fields class "C" grades into class "D" by so imperceptible steps that there is a transition zone of many miles between the two, and an inconsistency results in classing coal in the same field on one side of a line which is determined by a calorific value on a basis of 14 inches, and on the other side of the line on a basis of 36 inches. I am also of the opinion that 14 inches is too thin for some of the lower grade "C" coals.

To correct these matters I recommend that for paragraph (2) in the existing regulations, which reads: "Lands underlain by coal beds none of which contain 14 inches or over of coal, exclusive of partings, of class A, B or C, or over 36 inches of class D, shall be classified as noncoal land," there be substituted:

Lands underlain by coal beds which contain 14 inches or over of clean coal, exclusive of partings, shall be classified as coal land where the coal shows a calorific value of 10,500 B. T. U. or over on an unweathered air-dried sample; for coals having a less calorific value the minimum thickness shall be increased one inch for every decrease of 100 B. T. U. below 10,500. Thus, the minimum thickness of a coal having a B. T. U. value of 8,500 on an unweathered air-dried sample will be 34 inches.

Very respectfully,

GEO. OTIS SMITH, *Director*.

Approved, February 10, 1910:

R. A. BALLINGER, *Secretary*.

PUBLIC LAND—AGGREGATE AREA—APPROXIMATION—ACT OF
AUGUST 30, 1890.

PATRICK R. O'CONNOR.

A homestead entry for forty acres, made by one who had theretofore acquired title under the public land laws to 288.17 acres, allowed to stand, under the rule of approximation, notwithstanding the provision of the act of August 30, 1890, that no person shall be permitted to acquire title to more than 320 acres in the aggregate under all the public land laws.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, February 10, 1910.* (E. J. H.)

The land involved herein is the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 28, T. 11 N., R. 2 E., Bellefourche, South Dakota, land district, and the case is before the Department upon the appeal of Patrick R. O'Connor from your office decision of August 26, 1909, holding for cancellation his homestead entry, made February 25, 1908, for above-described land, for illegality.

It appears that in the homestead affidavit accompanying O'Connor's application it was stated that—

I am the owner of 288.71 acres only, acquired under the desert-land law, F. D. 35, which was acquired since August 30, 1890, this is the only land I own.

The appeal is based upon the claim that the foregoing statement contained in said homestead affidavit is erroneous; that the United States commissioner before whom the same was made misconstrued entryman's answer to the question asked him as to his ownership of land; that he had formerly made entry of 288.71 acres under the desert-land law, but had sold the same and executed deeds therefor about three months prior to making the homestead application and affidavit in question, and that he was not therefore at the time of making this entry the owner of any land; that it was his intention to have the affidavit state, and supposed that it did state, in substance, that he had theretofore only made entry of said 288.71 acres under the public-land laws, and not that he was now the owner of said land. It was therefore asked that said entry be allowed to remain intact.

Accompanying the appeal is the affidavit of the entryman, also affidavits of Patrick J. O'Connor and John O'Connor, to whom said lands are alleged to have been sold, together with those of A. H. Maxwell and J. M. Armstrong, composing the firm of attorneys that drew the deeds referred to, and before whom the same were executed and witnessed.

The entryman, in his affidavit, makes practically the foregoing allegations and states that having become involved in debt by reclaiming said lands he, on November 4, 1907, sold and deeded about half thereof to John O'Connor for \$1,000, and the balance to Patrick J. O'Connor for a like amount, in order to pay his indebtedness; that upon making the homestead entry in question he entered upon the tract and has ever since made the same his home.

This affidavit is corroborated as to the sale of said 288.71 acres of land by the affidavits of the purchasers thereof and by the affidavits of the attorneys hereinbefore named, who attended to the business for said parties. The deeds referred to are on file in the case and appear to have been duly executed and recorded.

It would seem that under the showing the entry in question should not be canceled, by reason of the statutory provision that a party will not be allowed to make homestead entry who is "the proprietor of more than 160 acres of land in any State or Territory."

It is provided by the act of August 30, 1890 (26 Stat., 391), that—

No person who shall, after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws, shall be permitted to acquire title to more than 320 acres in the aggregate under all of said laws.

In this case it appears that the 40-acre tract covered by this entry, together with the 288.71 acres acquired under the desert-land laws since August 30, 1890, would make an excess of 8.71 acres above the 320 acres allowed.

So far as said act is concerned, the entryman is still entitled to acquire 31.29 acres under some of the public-land laws relating to "occupation, entry, or settlement," and the Department is of opinion that the entry should not be canceled, but that under the rule relating to approximation it should be allowed to remain intact, upon payment at the legal rate for the excess in area.

Your office decision, holding the entry for cancellation, is accordingly reversed.

CHEYENNE RIVER AND STANDING ROCK LANDS—SCHOOL INDEMNITY SELECTIONS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 17, 1910.

REGISTER AND RECEIVER,
Aberdeen, South Dakota.

SIRS: Section 1 of the act of Congress approved May 29, 1908 (35 Stat., 460), provides:

That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Cheyenne River and Standing Rock Indian reservations in the States of South Dakota and North Dakota lying and being within the following described boundaries, to-wit: Beginning at a point on the one hundred and second meridian of longitude west, where the township line between townships nine and ten north intersects the same; thence east on said township line to a point where the same intersects the range line between ranges twenty-four and twenty-five east of the Black Hills meridian; thence north on said range line to a point where the same intersects the township line between townships fifteen and sixteen north; thence east along said township line to a point in the center of the main channel of the Missouri River; thence in a northerly direction along the center of the main channel of said Missouri River to a point where the township line between townships eighteen and nineteen north intersects the same, and including also entirely all islands if any in said river; thence west on said township line to a point where the range line between ranges twenty-two and twenty-three east intersects the same; thence north along said range line to the northwest corner of section nineteen in township twenty-one north of range twenty-three east; thence east on the section line north of sections nineteen, twenty, twenty-one, twenty-two, twenty-three and twenty-four to a point where the same intersects the range line between ranges twenty-three and twenty-four east; thence north along said range line to the State line between the States of South Dakota and North Dakota; thence west on said State line to a point where the range line between ranges eighty-four and eighty-five west

in North Dakota intersects the same; thence north on said range line to a point where said range line intersects the center of the main channel of the South Fork of the Cannon Ball River; thence in a westerly direction up and along the center of the main channel of the said river to a point where the same intersects the one hundred and second meridian of longitude west; thence south along said one hundred and second meridian of longitude west to the place of beginning, except such portions thereof as have been allotted to Indians.

Section 7 of this act provides:

That sections sixteen and thirty-six of the land in each township within the tract described in section one of this act shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at one dollar and twenty-five cents per acre, and the same are hereby granted to the States of South Dakota and North Dakota for such purpose as the same are located in the said States respectively; and in case any of said sections, or parts thereof, are lost to said States by reason of allotments thereof to any Indian or Indians, or otherwise, the governors of said States, respectively, with the approval of the Secretary of the Interior, are hereby authorized, within the area in the respective States described in section one of this act, to locate other lands not occupied not exceeding two sections in any one township, which shall be paid for by the United States as herein provided, in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement.

The State's right of selection under the provisions of said act of May 29, 1908, is restricted to lands not occupied and not exceeding two sections (1280 acres) in area in any one township, within the boundaries of the lands described therein, in lieu of lands of equal acreage in school sections 16 and 36, within said tract, lost to the State by reason of allotments to Indians, or otherwise. The selections must be made prior to the opening of the lands to settlement.

The President in proclamation of August 19, 1909 (38 L. D., 157), named April 1, 1910, as the first date for making entries under the provisions of the said act. This date has been changed by Presidential order of February 8, 1910, to May 1, 1910, and the latter date will be considered for the purpose of State selection as the date of the opening of the lands to settlement.

The selections should be made on forms used for the selection of indemnity school lands, so modified as to show that applications are made under the provisions of the act of May 29, 1908, and must be supported by the usual non-mineral, non-saline and non-occupancy affidavits.

In view of the fact that claims to these lands by allotment are record claims, and that the unallotted lands will not be subject to homestead settlement during the period within which the State is authorized to exercise the right of selection, the requirement of publication of notice of selections will be waived, and as the tracts to be designated as base for these selections are lost to the State by allotment, or otherwise, no certificates of county officers showing non-sale

and non-encumbrance by the State of such base tracts need be furnished.

You will not allow State selections to be made in the present Standing Rock reservation based on losses in the Cheyenne River reservation, or selections to be made in the Cheyenne River based on losses in the Standing Rock reservation, but you will require selections in each reservation to be based on losses in the same reservation as that in which the losses are sustained.

You will soon be furnished with a list of lands reserved for town-site purposes. You will allow no selection by the State of lands so reserved.

Lists of selections of the lands considered herein, accepted by you, will be given proper serial numbers and will be transmitted to this office in special letters. Care must be taken to place notations showing the fact and date of transmittal in each case in the column for remarks in the "schedule of serial numbers" for the month in which the lists are accepted and transmitted.

There is inclosed herewith for your information and the files of your office a copy of office letter "G" of December 9, 1909, addressed to the Governor of South Dakota.

The local officers at Pierre, to whom the copies of all Cheyenne River and part of the Standing Rock allotments have been sent, have been directed to forward the said copies to your office, for proper notation on your records, in so far as they affect lands in your district, and for the files of your office.

A copy of the remaining Standing Rock allotments in your district will also be sent you for the like purpose.

Very respectfully,

S. V. PROUDFIT,
Acting Commissioner.

Approved:

R. A. BALLINGER, *Secretary.*

**APPLICATION—APPEAL FROM REJECTION—SECOND RECEIVED AND
SUSPENDED.**

DeCOURCY v. VANDEVERT.

An appeal from the rejection of an application to enter entitles the applicant to judgment only as to the correctness of such action at the time taken and upon the showing made when the application was presented to and passed upon by the local officers; and if properly rejected when presented, it should not thereafter be allowed, upon a supplemental showing filed with the appeal, to the prejudice of an intervening application filed prior to such appeal and supplemental showing.

Instructions of September 22, 1884, modified to permit applications to enter to be received and suspended subject to the disposition of prior rejected applications; but entries thereunder should not be allowed until the prior applications have been finally disposed of.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, February 17, 1910.* (J. H. T.)

Robert L. DeCourcy has appealed to the Department from your decision of September 27, 1909, holding his homestead entry for cancellation in part because of conflict with a prior application by Thomas W. Vandever. DeCourcy's entry was made November 18, 1908, for the E. $\frac{1}{2}$ SW. $\frac{1}{4}$, W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 19, T. 20 S., R. 11 E., The Dalles, Oregon, land district.

It appears that on October 30, 1908, Vandever applied to enter the W. $\frac{1}{2}$ SE. $\frac{1}{4}$, W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 19, T. 20 S., R. 11 E., W. M., as a second homestead entry under the act of February 8, 1908 (35 Stat., 6). His application was rejected by the local officers and appeal was taken to your office. On August 14, 1909, you modified the decision of the local office in view of supplemental showing made by Vandever, and directed allowance of his application.

Because of the conflicting claims to the land involved, it has been necessary for the Department to consider the facts in connection with the application of Vandever. The papers in that case have been considered, except the application and papers in support thereof, which you returned to the local office when you directed allowance of the application. The facts, however, appear to be sufficiently stated in the decision of the local office and in your decision. The local officers in their decision of October 30, 1908, assigned as a reason for the rejection of Vandever's application that it did not show that the former entry was abandoned prior to the passage of the act of February 8, 1908. They found that the former entry was relinquished on March 24, 1908, and that the land was entered the same day under the timber and stone law, by Maude E. Vandever, who appears to be a sister of the present claimant, and they stated that in view of this fact, together with the fact that the six months allowed within which to establish residence on the former entry had not expired at date of its relinquishment, the strongest possible corroborative evidence was required that he received no consideration for abandoning the former entry. Instead of filing new application or making proper showing, Vandever appealed to your office and submitted supplemental affidavit, which you considered sufficient to show that he received no consideration for relinquishing his former entry, and that he had abandoned the same prior to February 8, 1908. Therefore, in view of the facts shown by said supplemental testimony,

you modified the decision of the local office and directed that Vandever be allowed to make entry.

DeCourcy filed his application November 18, 1908, for the E. $\frac{1}{2}$ SW. $\frac{1}{4}$, W. $\frac{1}{2}$ SE. $\frac{1}{4}$, said section, township, and range, and entry No. 01711 was made. By your said decision of September 27, 1909, you held that the local officers erroneously allowed said entry in conflict with the application of Vandever, and you accordingly held the entry for cancellation in so far as it conflicted with the prior application of Vandever.

The act of February 8, 1908, *supra*, allows a person otherwise qualified to make a second homestead entry where such person has made and lost, forfeited, or abandoned a former entry prior to the passage of said act, and such former entry was not canceled for fraud, nor abandoned or relinquished for a consideration.

Vandever relinquished his former entry on March 24, 1908, and when he made his application for second entry, he did not show that he had abandoned his former entry prior to the date of the said act. The local officers therefore correctly rejected the same. See Instructions of February 29, 1908 (36 L. D., 291). On appeal to your office, Vandever made a supplemental showing which was considered sufficient to show his qualifications to make entry, and you directed that entry be allowed in view of said showing. This action could have been properly taken only in case there was no intervening adverse claim. Upon appeal Vandever was entitled to judgment only upon the action taken by the local officers in rejecting his application upon the showing made at the time they rejected it. Your office appears to have concurred in their action as you directed allowance because of the supplemental showing. The action of the local officers in allowing DeCourcy to make entry for the land, which was in part embraced in the rejected application of Vandever, was not good practice. Vandever had not at that time filed appeal, but the period within which appeal could be taken had not then expired. DeCourcy should have been notified that entry could not at that time be allowed for the entire area applied for on account of the prior application of Vandever, and that he would be allowed thirty days from notice within which to elect whether he would amend his application so as to eliminate the part in conflict or have his application suspended to await final action on the application of Vandever. The instructions of September 22, 1884 (3 L. D., 119), are modified so as to permit applications to be received and suspended subject to the disposition of any prior rejected application, but entry will not be permitted until such prior application is finally disposed of. See case of Jerry Watkins (17 L. D., 148).

While the entry of DeCourcy was prematurely allowed, yet the rights of neither party are prejudiced by the allowance of said entry,

and the controversy will be disposed of the same as though DeCourcy's application had been suspended. It must be held that DeCourcy has superior right to the land in conflict. His entry will be allowed to stand. The application of Vandever, in so far as it conflicts with said entry, is rejected. Your decision is accordingly reversed.

BIESANZ *v.* JACOBSON.

Motion for review of departmental decision of November 26, 1909, 38 L. D., 317, denied by First Assistant Secretary Pierce, February 19, 1910.

RAILROAD LANDS—HOMESTEAD SETTLER—SECTION 6, ACT OF MAY 29, 1908.

LEOPOLD BAUER.

The purpose of section 6 of the act of May 29, 1908, was to place homestead settlers upon lands in odd-numbered sections within the conflicting limits of the railroad grants therein mentioned, who were prevented from completing title to the lands by reason of the decision of the Supreme Court in the case of Wisconsin Central R. R. Co. *v.* Forsythe, in the same situation, relatively, as to other lands entered by them within the prescribed period, as they up to the time of the court's decision had assumed they occupied with reference to the lands settled upon within the railroad grants.

Where prior to actual knowledge that the land he had settled upon was not subject to homestead entry the homesteader had so far complied with the law as to have acquired a vendible interest in the land if it had been subject to such entry, the right conferred upon him by the act of May 29, 1908, would be transferable to the same extent as his interest in the land settled upon would have been; but any attempted transfer of such right by one who had not prior to such knowledge sufficiently complied with the law to acquire a vendible interest, confers no right upon the purchaser, and an entry allowed under such attempted transfer, in the name of the homesteader but in the interest and for the benefit of the transferee, is void.

First Assistant Secretary Pierce to the Commissioner of the General
(O. L.) *Land Office, February 21, 1910.* (S. W. W.)

This case involves the construction of section six of the act of May 29, 1908 (35 Stat., 465), passed for the relief of certain homestead entrymen who settled on railroad lands in Wisconsin, and is before the Department on appeal from your office decision of November 26, 1909, holding for cancelation final homestead entry made under said

act, embracing lot 7, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and lot 9 of Sec. 14, and lot 3 of Sec. 23, T. 4 N., R. 93 W., containing 164.10 acres, Glenwood Springs, Colorado, land district.

The facts are as follows: Under departmental order of October 22, 1891, effective November 2, following, all lands in the Ashland, Wisconsin, land district, under withdrawals theretofore made and held for indemnity purposes under the grants for the benefit of the Chicago, St. Paul, Minneapolis and Omaha Railway Company, were "restored to the public domain and opened to settlement and entry under the general land laws."

June 12, 1893, Bauer made homestead entry, No. 3369, at Ashland, Wisconsin, for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 17, T. 46 N., R. 4 W., containing 120 acres, said tracts being a portion of those restored by the above mentioned order. The Supreme Court in the case of Wisconsin Central Railroad Company *v.* Forsythe (159 U. S., 46), by decisions rendered June 3, 1895, determined that the lands involved belonged to the Wisconsin Central Railroad Company, and Bauer's entry was, accordingly, held for cancellation by your office letter "F" of November 13, 1895, and was, pursuant to notice and order to show cause, served on Bauer on November 26, 1895, finally canceled March 24, 1896. The fees and commissions paid on this entry were ordered refunded December 10, 1904.

May 29, 1908, the act referred to was passed, section 6 of which is as follows:

That all qualified homesteaders who, under an order issued by the Land Department bearing date October twenty-second, eighteen hundred and ninety-one, and taking effect November second, eighteen hundred and ninety-one, made settlement upon and improved any portion of an odd-numbered section within the conflicting limits of the grants made in aid of the construction of the Chicago, Saint Paul, Minneapolis and Omaha Railway and the Wisconsin Central Railroad and were thereafter prevented from completing title to the land so settled upon and improved by reason of the decision of the Supreme Court in the case of Wisconsin Central Railroad Company against Forsythe (one hundred and fifty-ninth United States, page forty-six), shall, in making final proof upon homestead entries made for other lands, be given credit for the period of their bona fide residence upon and the amount of their improvements made on the lands for which they were unable to complete title. In the event that any entryman entitled to the benefits of this act, shall have died the right to make such second entry shall inure to his surviving widow, and if there be no widow living then to his minor child or children, if any, in the manner hereinbefore provided: *Provided*, That no such person shall be entitled to the benefits of this act who shall fail to make entry within two years after the passage of this act: *And provided further*, That this act shall not be considered as entitling any person to make another homestead entry who shall have received the benefits of the homestead law since being prevented, as aforesaid, from completing title to the lands as aforesaid settled upon and improved by him.

On the date of the passage of this act a contract was entered into by which Bauer agreed to sell to one B. B. Jones all his right, title and interest in and to the lands to which he, Bauer, might become entitled under said act. On December 8, 1908, admittedly pursuant to said agreement, there was filed in the local land office at Glenwood Springs, Colorado, application in Bauer's name to enter, as a homestead, the tracts of land in that State heretofore described, with which there were submitted certain so-called proofs to the effect that Bauer had established residence on the land in Wisconsin and continued to reside upon and improve the same from the year 1893, upon the filing of which, together with certain additional evidence respecting publication of notice, etc., the local office at Glenwood, on February 16, 1909, issued final certificate No. 01073, reciting that the entry was allowed under instructions contained in the circular of June 9, 1908 (36 L. D., 504).

Your office decision under consideration holds that Bauer did not make the entry of the Colorado lands for his own use and benefit, but for the benefit of Jones, pursuant to the contract referred to; that he never established or maintained residence on the land in Colorado and never cultivated the same; and that he was not entitled to credit for any residence maintained upon the Wisconsin lands beyond the date of receipt by him of notice of the cancellation of the entry thereof because of conflict with the railroad claim, a period of less than three years.

You further held that Bauer was not authorized by the act of May 29, 1908, *supra*, to make second entry, and, having exhausted his original homestead right by the entry made in Wisconsin, notwithstanding such entry was canceled for illegality, he must rely upon some other act, such as that of February 8, 1908 (35 Stat., 6), and, as he had not complied with all the requirements of the homestead law while holding the Wisconsin entry, his agreement with Jones, executed before he, Bauer, had made application for the lands here involved, was in violation of the homestead act and rendered his entry invalid.

In elaborate briefs and upon oral argument it is strenuously contended that your conclusions are erroneous.

The purpose of the act of May 29, 1908, was to place the homesteaders therein specified in the same situation, relatively, as to other lands upon which they should make entry within the prescribed period as they, up to the time of the Supreme Court's decision, had assumed they occupied with reference to the lands held to be included within the limits of a railroad grant.

If a homesteader on the Wisconsin lands had, prior to actual knowledge that the assumption that he had settled upon government land

was erroneous, so far complied with all the requirements of the homestead law as to have acquired a vendible interest had the land belonged to the United States, it might well be said that the right vested in him by the act of May 29, 1908, would be transferable to the same extent as his interest in the homestead would have been. Bauer, however, did not make entry of the Wisconsin lands until June 12, 1893; the decision in the Forsythe case was rendered June 3, 1895; and on November 26, 1895, he received formal notice to show cause why his entry should not be canceled because of conflict with the claim of the railroad company. It further appears that he thereafter purchased the land from the railroad company and has continually, from the time of his original settlement, resided thereon.

That Bauer could not maintain *bona fide* residence upon the Wisconsin land within the terms of the act of May 29, 1908, after November 26, 1895, the date of the formal notice to him of the fact that said land did not belong to the United States, would seem to be clear, because, while before that time he and the government were laboring under the mutual mistake that his acts in conformity with the requirements of law were all tending to establish title as against the government, after that date he knew the land belonged to the railroad company and that, no matter how long he might continue to reside thereon, or to what extent he might improve it, he could never acquire title under the public land laws. I am, therefore, of opinion that Bauer was entitled to credit or allowance for residence maintained on the Wisconsin land only from the date of his entry June 12, 1893, to the date he received notice of the order holding his entry for cancellation, November 26, 1895.

No importance is attached to the fact that in 1904 (eight years after the Wisconsin entry had been canceled) Bauer appeared before the local land office at Ashland, Wisconsin, and submitted what he termed final proof on his Wisconsin entry, for the reason, among others, that the latter office then had no jurisdiction in the premises.

It is only necessary to a determination of this case to decide that Bauer is not entitled to credit for residence on the Wisconsin land beyond November 26, 1895; that on said date he had not completed such a period of residence as would, if accompanied by appropriate cultivation and improvement, have vested him with a vendible interest had the land belonged to the government; that the Colorado entry here involved was made pursuant to an agreement contrary to the policy of the homestead laws, was not in his own interest, and is void.

To the extent above indicated the Department is in accord with the views expressed in your decision, and the same is affirmed.

CERTIFIED COPIES OF SPECIAL AGENTS' REPORTS AND OFFICIAL COMMUNICATIONS PERTAINING THERETO.

CLARK, PRENTISS & CLARK.^a

Special agents' reports and official correspondence pertaining thereto are in the nature of confidential and privileged communications, and certified copies thereof can not be demanded as a matter of right by the parties in interest in the matter to which they relate, and will not be furnished except upon authority of the Secretary of the Interior.

Commissioner Dennett (approved by First Assistant Secretary Pierce) to Messrs. Clark, Prentiss & Clark, Washington, D. C., October 16, 1908.

By your three several letters of September 26, 1908, you requested me to supply you, as attorneys for the Utah Fuel Company and the Pleasant Valley Coal Company, with certified copies of certain papers and documents therein specified and described, including several reports made to this office by various special agents, as well as official communications passing between this office and its said agents and pertaining to such reports, or to the investigations subsequently resulting therein. You have heretofore been advised, orally, and through my refusal to testify concerning the contents of said several reports and official communications, in the deposition given in by me on October 7th last, in response to a subpoena from Justice Clabaugh, of the Supreme Court of the District of Columbia, that I would refuse, as well, to supply you with *certified copies* of those papers and documents concerning the contents of which I so refused to testify. On this last mentioned occasion, in response to each and every question addressed to me concerning the contents of such papers, I made the following answer:

By the advice of the Assistant Attorney-General of the Department of the Interior and under the direction of the Secretary, and upon my own claim of official privilege, with the full belief that all communications between special agents of the General Land Office and the Commissioner of the General Land Office are privileged communications against public interests to disclose, and do not affect the title to public lands and as such are not papers concerning which the Commissioner of the General Land Office would be called upon to testify by a court, after consideration of the question, I must respectfully decline to answer, unless directed to do so by the court itself.

The purpose of this letter is to officially and formally communicate to you knowledge of my refusal to furnish copies of those documents for which privilege was thus asserted.

^a The Commissioner of the General Land Office, by letter of February 26, 1910, requested that this paper be printed in the Land Decisions for the information of the field service, as well as attorneys and the public, and for convenient reference.

I desire, at the same time, to afford you some information concerning the reasons which control and determine my course in this connection, wishing you to understand that my action was and is not the exercise of mere arbitrary will, regardless of all judicial or official discretion, but that it was had pursuant to instructions with which I am in hearty accord and which are, in my judgment, justified and supported by good public policy and safe and sound principles of administration.

Advising you now more specifically concerning these instructions, and the principle upon which they are based and must be maintained, if at all, I would state:

First. That under date of August 23, 1907, there was published by this office, with the approval of the Acting Secretary of the Interior, a regulation to the effect that on and after September 1, 1907, letters, press-copies, reports, or other papers on file in the Field Service Division, or related to any case or matter referred to or pending in such division, excepting such papers as are technically a part of the application or entry, or such papers as may be a part of the pleadings in any case, should not be subject to inspection by claimants, attorneys, or the public. I enclose a copy of that order for your better information concerning its purport and effect.

The administrative necessity which gave birth to this regulation will be readily perceived and appreciated when attention is called to the fact that the papers which were thus given a confidential character quite generally relate to investigations being made by special agents of this office with the end in view of recovering title to Government lands which have been acquired by unlawful and corrupt methods and practices, and, probably, the punishment of the persons who have violated the laws of the United States made and provided in that connection. These reports more or less commonly disclose sources of information on which the special agent, or this office, proceeded to the initiation of such investigations, as well as the evidence upon which the Government would have to rely to establish its case, the progress of the inquiry, and the character of the proceeding, or remedy, contemplated. It is scarcely necessary to suggest that the efforts of the Government, in the proper enforcement of law, would oftentimes be impeded, if not wholly thwarted and defeated, should the contents of these documents be published to the public. Again, it not infrequently happens that the field representatives by whom such reports are made have received information and assistance from persons interested in the enforcement of the law, but whose situation is such that they would be seriously prejudiced should the fact that they had given such aid become known to the persons against whom such an investigation was directed. These persons very often request and obtain from the agent

a definite assurance against disclosure of their names, except in so far as such disclosures may be necessarily made to officials of the Land Department. Under the practice at one time obtaining in this office, the names of such persons were occasionally ascertained and reported to other persons interested in discovering them, with the result that the further pursuit of the particular investigation, or investigations of like character in the same neighborhood, was rendered much more difficult and frequently wholly frustrated.

Second. Upon receipt of your said request, the determination of whether or not it should be granted to the extent made, and, if not, then to what extent, if any, was by me remitted to the Secretary of the Interior, to whom the power of determination properly belonged under the law. On October 3d last, after consideration of the matter, the Secretary orally, but nevertheless explicitly, directed me not to comply therewith, in so far as such compliance would involve disclosure of the contents of special agents' reports and official correspondence resulting in or from same. This designation of official correspondence did not, of course, embrace decisions of this office, or of the Department, intended for communication to the parties in interest, or correspondence with the register and receiver at any district land office which merely related to the completion and perfection of the several lists of selections made by the State of Utah. Inasmuch as the Secretary of the Interior is, by section 161 of the Revised Statutes of the United States, authorized to prescribe regulations governing the use, custody, and control of the records of the Interior Department, and inasmuch as the General Land Office is one of the bureaus over which he exercises jurisdiction and authority by law, it would seem that the direction thus given to me was and is, of itself, sufficiently authoritative to control my action on your request.

It is not incumbent upon me to argue the propriety and legal warrant for instructions communicated to me by the head of the Interior Department, to whose direction I am subject. On the contrary, the discussion of such a subject by me, in a communication of the character of this one, would be obviously inappropriate. I need only say that a painstaking examination of numerous text-book authorities and decided cases convinces me that those instructions are firmly founded upon and supported by the well-understood general principle of law that communications between officials of government, pertaining to, or affecting, the enforcement of the laws or the transaction of the public business of the state in whose service those officials are engaged, are privileged and protected from enforced disclosure. The rule that such documents cannot be drawn away from or out of their proper place of custody, either in their original form or in the form of certified copies, is of ancient origin and has been

maintained, without deviation or diminution, to the present day. An equally well-settled branch of that rule protects the contents of such documents against disclosure by enforced testimony of persons conversant with them, or by other secondary evidence of such contents.

The intimation has been made that by the strict terms of sections 461 and 2469 of the Revised Statutes of the United States, which make it the duty of the Commissioner of the General Land Office to cause to be prepared, and certified under the seal of the General Land Office, copies of all papers in anywise affecting the title to lands in which the person applying for such copies is shown to be interested, no discretion is left to that official by which he may refuse to furnish such copies, but that the duty is mandatory, leaving the Commissioner possessed of no judicial responsibility or authority in the premises. It is sufficient to say, in response to this intimation, that the statutes cited do not seem to require such a construction, and that there is no command voiced by those sections which requires the Commissioner of the General Land Office to grant requests for copies of papers *not a part of the record by which the right to a patent for any particular tract of public land is established, or defeated*. On the contrary, they are easily capable of a construction which, in my opinion, clearly justifies a refusal to furnish copies of papers which constitute portions of a record *merely collateral* to that on which patent must be issued, or denied, such as the record of and pertaining to an investigation made by a field employee, which has for its purpose the protection of public lands against unlawful appropriation, possession, and use. It is readily admitted that copies of papers and records upon which the right to title must stand or fall, according to statute law or authorized regulations, including herein the records of contests and promulgated official decisions adjudicating claims to public lands, cannot well be refused; and I am not advised of any disposition on the part of the Department to deny an application for any such papers or records. But it is confidently asserted that Congress did not intend, by the statutes cited, to deprive the Interior Department of the right to conduct investigations by confidential agents and to possess reports and correspondence of a confidential character, such as are not only expedient, but absolutely necessary, if the Department is to successfully exercise its power to enforce the laws against unlawful appropriation of the public lands. No more extended discussion of this proposition seems to be necessary here.

You have personally solicited my attention to the opinion of the Assistant Attorney-General for the Department of the Interior, in the case of Albert H. Horton (24 L. D., 379), in which that official took the view that after final action had been had by the Depart-

ment in any case affecting the title to public lands, such as ordering a hearing on the report of a special agent or recommending suit to cancel a patent, no reason remained for insisting upon a continuance of the confidential character and status of the paper, upon which such action had been taken. I need only say of that opinion that it required the approval of the Secretary of the Interior to give it any force to govern the administration of this office in such matters as that to which it pertained, and that it has not been adhered to by the present secretary is manifested by the instructions severally referred to in the opening portion of this communication. The evils to result from such a practice were not then perhaps so fully understood as they are now, having been more or less effectively exemplified and illustrated in two or more instances within the last two or three years; and reasons for insisting upon the confidential character of such papers, which did not then appear, have since been sufficiently disclosed by experience.

You are, finally, advised that certified copies of all the other papers mentioned in your letters, as modified by your letter of October 7, 1908, will be at once prepared and furnished to you in accordance with your request.

PRICE OF LAND WITHIN GRANTED LIMITS OF RAILROAD.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., March 2, 1910.

REGISTERS AND RECEIVERS,

United States Land Offices.

GENTLEMEN: Under date of November 27, 1909, in the case of Walter Hollensteiner (38 L. D., 319), the Department held that lands within the granted limits of a railroad, but excepted from the operation of the grant for any reason, are "double minimum lands," as provided by section 2357, U. S. Revised Statutes, fixing the price of such lands at \$2.50 per acre. You will be governed by said decision in disposing of all such lands (both odd and even sections), and in the collection of commissions thereon.

This decision will not affect the price of land in reservations within said granted limits, opened under special acts of Congress, passed after the date of definite location of the road, when from said acts, or from an Indian treaty, it is apparent that Congress intended that a price, other than that fixed by section 2357, R. S., should be collected.

In case of any doubt as to the proper price of the land, you should suspend the case and ask for instructions from this office.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved, March 2, 1910:

R. A. BALLINGER,
Secretary.

REPAYMENT—MINERAL SURVEY DEPOSIT—STATEMENT OF ACCOUNT—ACT OF FEBRUARY 24, 1909.

PETER N. HANSON.

In making up an account under the act of February 24, 1909, authorizing repayment of any excess of amounts deposited for the survey of mining claims, the surveyor-general should state the account from the best data and information obtainable; and a *bona fide* official account, prepared from such data, will be accepted by the General Land Office and the Department, unless clearly shown to be erroneous.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, March 2, 1910.* (E. B. C.)

Peter N. Hanson has appealed from your office decision of November 23, 1909, affirming the accounting and findings of the surveyor-general for South Dakota, and denying appellant's application, under the act of February 24, 1909 (35 Stat., 645); for repayment of any portion of the sum of \$30, deposited May 20, 1903 (certificate of deposit No. 69, issued by the First National Bank of Deadwood, South Dakota), to cover the cost of office work in connection with the survey (No. 1760) of the Dump lode mining claim, Rapid City land district.

The order for survey issued May 23, 1903; the survey was made June 12, returned to the office of the surveyor-general June 22, and approved by the surveyor-general on July 17, 1903.

This case has been before the Department upon a prior occasion, and was considered in its decision of August 26, 1909 (38 L. D., 169), where the facts are quite fully stated. That opinion concludes as follows:

The instructions of your office and the decision of the surveyor-general are not in accord with either the letter or the spirit and purpose of the act, which evidently contemplates that an account shall be stated in every case where application for repayment is made, and if it appears that there is any excess in the amount deposited, over and above the "actual cost" of the work performed and the expenses incident thereto, it should be stated and certified by your office from the best data and information obtainable.

The cost of the platting of said survey and of the copies of said plat and field notes required to be made of mineral surveys should be ascertained by the

value and usual charge for such work at the time it was rendered. The other expenses incident thereto which can only be approximated should be ascertained from such data and information as you may acquire from the records or custom of your office showing what proportion of the estimated cost such expenses bear to the whole amount.

You will instruct the surveyor-general to state this account in accordance with the instructions herein.

In promulgating the above decision your office, September 4, 1909, advised the surveyor-general as follows:

You will accordingly state an account showing the amount of money received by your office in connection with said survey, with a statement of the cost of platting same and of the copies of plat and field notes which, as stated in said decision, you will ascertain by the value and usual charge for such work at the time it was rendered. Any other expense incident thereto you may approximate from such data and information as the records or customs of your office may warrant.

On November 2, 1909, the surveyor-general addressed to the attorney of record for the applicant a letter concluding as follows:

Upon investigation it is found that the actual cost of the work in platting, preparing plats, and transcript field notes ascertained in the manner directed in the stated decision of the Hon. Secretary of the Interior is----- \$25.00
Incidental expenses (approximated)----- 5.00

Total cost of work in this office upon said survey No. 1760----- 30.00

The entire amount deposited for said survey has therefore been earned.

From the above statement of account the applicant appealed to your office. The decision now complained of was then rendered, wherein it was found that the account stated by the surveyor-general was made up in accordance with the above departmental instructions, and the action of the surveyor-general was affirmed. Further appeal has brought the case here.

Appellant charges that the account stated by the surveyor-general is purely an imaginary one and does not show how many plats were prepared, how long it took to plat, what was paid and to whom for the platting, what time was required or what was paid for preparing the field notes, or what was the cost of the stationery used. The appellant also claims that the entire deposit is unused, for the reason, as he alleges, that the work was done by the regular office force and paid for from the annual appropriation for that year, and that consequently the whole of the deposit is still in the Treasury.

Counsel concludes his brief upon appeal with the request that—

The Hon. Secretary have the General Land Office send him a statement that will show how much of the South Dakota deposits for office work in the surveyor-general's office of that State has been drawn from the United States Treasury from said mineral deposits and placed to the credit of the surveyor-general of South Dakota prior to February 24, 1909, so that this matter can be adjusted as was intended by Congress when the act of Feb. 24, 1909, was passed.

The mining statute provides that the expense of the survey of mining claims "shall be paid by the applicant." (Section 2334, Revised Statutes.) The applicant is required to file in the local land office, in connection with his application for patent, a plat and field notes of his claim or claims in common, made by or under the direction of the United States surveyor-general, and also a certificate from that officer showing that \$500 worth of labor had been expended or improvements made. (Section 2325, Revised Statutes.) Paragraph 91 of the mining regulations (37 L. D., 757, 775) requires that the applicant shall deposit in favor of the United States Treasurer the estimated cost of the platting and other work in the surveyor-general's office. The act of March 3, 1901 (31 Stat., 1003), contains a proviso to the effect that thereafter the stationery and drafting instruments purchased exclusively for use in the preparation of plats and field notes of mineral surveys, and also the rent of additional quarters that might be necessary for such work, should be paid out of the mineral survey deposit funds.

The repayment act of February 24, 1909, *supra*, provides for the repayment to depositors of "any excess in the amount deposited over and above the actual cost of the work performed, including all expenses incident thereto for which the deposits were severally made, or the whole of any unused deposit."

It is provided that the refund shall be made upon an account certified by the surveyor-general and approved by the Commissioner of the General Land Office.

May 14, 1909, applicant Hanson presented his verified application "for the return of — dollars and — cents, being the excess of unused mining survey deposit made in connection with" survey No. 1760. Accompanying the application is a formal power of attorney appointing James A. George the applicant's "true and lawful attorney, coupled with an interest, irrevocable," to collect for him whatever moneys may be due from the United States as excess under the \$30 deposit, and to receive for him all warrants, drafts, or other things of value due from the Government.

It would appear, it is first to be observed, that this power of attorney, which also substantially recites an assignment of at least an interest in the claim involved, is a nullity and must be so regarded and treated by the Department, because within the interdict of section 3477 of the Revised Statutes, which reads as follows:

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and

the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same.

The application, so far as the amount of refund claimed is concerned, is in blank, the applicant having specified no sum certain, and it represents a claim of which no ascertainment and allowance had been made. In this connection see *Nutt v. Knut* (200 U. S., 12, 20) and the cases there cited.

The surveyor-general reports, and the records of your office show, that the charge to the effect that the surveyor-general of South Dakota has utilized his regular office force, which has been paid from annual appropriations, in working up mineral surveys, is wholly without foundation in fact, and that a special and separate force has always been employed to work on mineral surveys, as the law and regulations contemplate. Equally without basis is the statement made by counsel in one portion of the record that "there is from \$65,000 to \$100,000 due depositors in South Dakota," the fact being that the balance to the credit of the surveyor-general for mineral survey deposits on July 1, 1909, fell many thousands of dollars short of the lowest amount stated above.

The surveyor-general, upon request, furnishes an estimate of the costs that will accrue in his office on each mineral survey. In making this estimate he has all the preceding years of the experience and records of the office to guide him, and it has been found that the usual cost of surveys is such that it has become convenient and practical for surveyors-general to adopt and follow a schedule for the expenses of work in their office. It would appear that the deposit in this case was the usual one for office work upon a survey where but a single lode location was involved. The office work was performed by the special mineral survey force engaged in such work. Whatever the expense or actual cost of the same may have been, that portion of the deposit in any event was used and earned, and the applicant has no interest therein or claim thereto.

While it appears to have not been the practice for surveyors-general to keep an actual cost account in connection with each survey deposit prior to the passage of the act of February 24, 1909, *supra*, yet the actual cost of office work, when called for, has been capable of ascertainment and adjustment with sufficient certainty for practical purposes. The departmental decision of August 26, 1909, definitely pointed out the procedure in this regard and condemned the rule of assuming that the whole of a deposit was earned where no

actual accounts were kept or where the office records failed to disclose any unused excess.

The statute authorizes repayment only upon an account to be certified by the surveyor-general and approved by your office. The concurrent actions in this regard of your office and the surveyor-general are requisite in order that the applicant for refund may have his claim presented to the Treasury for payment.

The surveyor-general in this case has stated that upon investigation it has been found that the actual cost of the plats and field notes, ascertained in the manner directed by the Department, is \$25, and that the incidental expenses (approximated) are \$5, and thereupon finds that the entire amount of the deposit has been earned. This is his official action under the guidance of the departmental directions. There is nothing found in the record tending to establish that this statement of account is not a fair, faithful, and correct finding by the official whose judgment must in the first instance be invoked. Your office, under whose direct supervision he acts, has upheld him in his position.

Unless shown to be clearly erroneous, these concurring conclusions must be sustained. The complaint to the effect that no *itemized* statement is submitted has but little merit. The work in question is technical, professional, and official. The mining regulations, paragraph 34, specified the number of plats required, and it is immaterial as to who did the platting or prepared the field notes or checked the entire work. The work was in fact executed and officially approved, and afforded the basis for patent, which, it is stated, the applicant in due time obtained. The record does not disclose that the estimated incidental expenses of the survey were other than those found.

It is true that counsel in argument sets forth an alleged "actual cost" account of \$10, asserting that he can get the work done for that amount. But even if it be conceded that such work in a private office might be done for less than the cost assigned by the surveyor-general, yet that would afford no ground for impeaching the account rendered by that officer as the actual cost of official work performed in his office.

After a complete examination of the record the Department concludes that the appellant's \$30 mineral survey deposit is not an unearned or unused deposit; that there is no excess of such deposit shown to exist over and above the actual cost of official office work in connection with the survey for which the deposit was made; and that, apparently, the surveyor-general's stated account is a *bona fide* official account, prepared from such data as the records of his office afforded, which has not been impeached by anything brought forward by the appellant.

As to the above-quoted request preferred in appellant's brief, it is sufficient to say that the Department perceives no occasion for granting the same, nor is the applicant entitled to the information sought.

The decision of your office herein is accordingly affirmed.

**DESERT LAND ENTRY—RECLAMATION WITHDRAWAL—DELAY—
SEC. 5, ACT OF JUNE 27, 1906.**

GUSTAVE GILBERTSON.

Where a government reclamation withdrawal interferes with and results in the abandonment of a private cooperative irrigation enterprise, a desert land entryman interested in such enterprise and prevented by the abandonment thereof from continuing his improvements and submitting proof within the time fixed by law, is within the act of June 27, 1906, and entitled to an extension of time under its provisions.

*First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) Land Office, March 3, 1910. (J. R. W.)*

Gustave Gilbertson appealed from your decision of August 14, 1909, rejecting his application for extension of time in which to make his third annual proofs on desert land entry for N. $\frac{1}{2}$, Sec. 8, T. 22 N., R. 1 W., M. M., Great Falls, Montana.

March 13, 1903, Gilbertson made desert land entry, and two yearly proofs have been made thereon, and the extension of time was granted by you to May 2, 1908, under act of June 27, 1906 (34 Stat., 519, 520), in which to make further proof.

March 24, 1908, the entryman filed affidavit for further extension of time to make proof, which the project engineer, August 27, 1908, recommended. You held that it does not appear from the application that the entryman has been hindered or delayed in making improvements such as are required for third yearly proof and rejected his application, allowing him sixty days in which to file affidavit showing that he had made the expenditures and improvements, or that he had in fact been hindered, delayed, and prevented from making such improvements by withdrawal of the land.

July 16, 1909, he submitted additional evidence which was found by you not satisfactory in that he states as a mere conclusion that he was hindered and delayed in making improvements by reason of the reclamation withdrawal, but does not state any fact on which such conclusion is drawn. He states that he has made all necessary improvements in preparation of said land for its reclamation and cultivation that it is practicable to make prior to the time that the water supply should become available for irrigation of the land, but does not state what these improvements are, or their value, as is required for third yearly proof.

The Department is unable to concur in this finding of insufficiency of his proofs. The entire record must be taken together. In his affidavit of April 22, 1907, he states that:

Immediately after making entry he, with many other persons, organized the Kilraven Co-operative Canal Company, and began construction of a canal from Sun River in Teton County, Montana, to divert water of Sun River over affiant's land and other land in its vicinity, and he, with others, expended \$20,000 on their reclamation works which are yet incomplete; that soon after all government land in T. 22 and 23 N., R. 1, 2 and 3 W., were withdrawn from entry except under the homestead laws October 17, 1903, for the Sun River Irrigation Project. That soon after the United States began active work and that its canal parallels the canal begun by the Kilraven Co-operative Canal Company, and his lands are within the area intended to be reclaimed by the government canal; that by reason of the work thus undertaken by the United States and withdrawal of the land above set forth many persons who agreed to take stock in the Kilraven Co-operative Canal Company and assist in its construction were unable to do so except under the restricted homestead laws, and therefore abandoned Gilbertson and his associates, thus making them unable to complete their canal.

Irrigation projects of such extent are necessarily co-operative. If such events happen by act of the government that continuance of co-operation of the original projectors is prevented, the case comes within the act of June 27, 1906, as a case of active interference by the United States preventing success of a private co-operative project. The affidavits in this case show that all ditches and laterals on Gilbertson's land have been made. This in his view, concurred in by the Department, is all that he can do because of interference of the United States under the Reclamation Act. That he has made all the ditches and laterals necessary for irrigation is shown by the affidavits. The engineer of the Reclamation Service reports that the cause which existed still continued to exist, and by the statute is supposed to continue to exist until notice is given that the government has abandoned its project. Entrymen are therefore not under obligation to do more until the government has ceased its interference by abandonment of its project, or has so far developed it that they can obtain water from its ditches for reclamation of their land.

Your decision is reversed and the extension will be granted.

RELINQUISHMENT—DEATH OF ENTRYMAN.

WILSON v. HOLMES ET AL.

A homestead entry by one who purchased the improvements and relinquishment of a prior entryman will not be canceled to reinstate the former entry, in the absence of fraud or bad faith, merely because the relinquishment of the former entry was filed after the entryman's death.

As between the parties a sale of improvements and relinquishment of an entry is a valid contract, and though it conveys no right as against the United States, it is obligatory on the entryman and his heirs, and the equity of the purchaser to make entry may properly be recognized if exercised promptly and prior to the intervention of any adverse right.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, March 3, 1910.* (J. R. W.)

Lobirta Holmes and Alfred A. Tooley appealed from your decision of February 26, 1909, canceling Holmes's homestead entry for E. $\frac{1}{2}$ SE. $\frac{1}{4}$ and Tooley's additional homestead entry for W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 18, T. 12 N., R. 26 W., Lawton, Oklahoma.

January 25, 1902, Everett Van Buren made homestead entry for both tracts. December 22, 1905, a relinquishment, executed by him December 2, was filed in the local office. December 27, 1905, Tooley applied for additional homestead entry for W. $\frac{1}{2}$ SE. $\frac{1}{4}$, which was allowed and entry made January 6, 1906. May 28, 1906, Holmes applied for homestead entry for E. $\frac{1}{2}$ SE. $\frac{1}{4}$, which was allowed and entry made June 5, 1906.

July 24, 1906, Helen C. Wilson filed contest affidavit against each entry, alleging they were fraudulent and void because Van Buren's relinquishment was obtained by false representation and undue influence, and was executed when at point of death, not in mental condition to do business, and was not filed until after his death. She asked, as his sister and sole heir, that his entry be reinstated. Notice issued for hearing, in which all parties participated, aided by counsel. Large part of the testimony was by deposition. November 16, 1907, the local office found upon both contests, as a single proceeding; that just before relinquishment Van Buren was sick, at Erick, Oklahoma, of a disabling and noisome disease, at house of a stranger and good Samaritan to him, who gave him shelter in the best room of his house, incurring expense in his care and medical treatment; that Van Buren while so sick sold his homestead, through an agent, but went to a health resort at Mineral Wells, Texas, before formally executing the relinquishment, because he could not find an officer before whom he could execute it, which he did at Mineral Wells, a day or two before his death, when of sound mind, to carry out the agreement before made, and without undue influence, fraud, misrepresentation, or persuasion, but it was made freely and voluntarily for a consideration to relieve his distressed condition; that nothing in the record at the local office showed the local officers knew of Van Buren's death; the relinquishment was good on its face, each contestee made entry in the ordinary manner for vacant land, innocent of any wrong, and the contests should be dismissed.

Your decision was based on the fact that one Cox in holding and delivering the relinquishment was only agent for the entryman, and such agency was terminated by Van Buren's death, citing *Orvis v. Banks* (2 L. D., 138); *Confar v. Confar* (15 L. D., 506); and *Robertson v. Messent's Heirs et al.* (18 L. D., 301). The fact findings of the local office appear not to have been questioned by you, and examina-

tion of the evidence discloses no ground seriously to question such finding in any material part. Tooley testified:

On January 6, 1906, I filed, but I had to get my right restored. I had bought the relinquishment December 18, 1905. I mean by that to say we closed our trade and they turned the relinquishment over to me that day, but I had been dealing with them for more than a month before this, but we could not agree on the terms. B. T. Stubbs told me that W. M. Cox had this land for sale, and between us all we finally closed the deal and I entered the land. I had nothing to do with procuring the relinquishment from Van Buren. They were simply agents of Van Buren and he had instructed them to sell it. I understood Van Buren had sent the relinquishment by Mr. Stubbs to Mr. Cox that Cox might close the deal with me.

W. M. Cox testified he had the claim for sale about two months, that Van Buren agreed to sell and relinquish the land for \$200 about a month before going to Mineral Wells, and that:

On Thanksgiving before leaving here he went before a U. S. Commissioner, got a blank relinquishment, before he could be sworn to it the commissioner had to be away, and he did not get it all fixed up that day. He went away next day, but told me at the train that the first notary he came to he would finish the relinquishment and send it back by Mr. Stubbs, and for me to get the \$200 if I could and if not to get just what I could, to get all the money I could and take a note for the balance and take my pay out and send the balance, he said he never intended to return to the land. "I am going to use it up . . . I am going to Texas and never expect to come to Oklahoma again. I want to get something out of the land to live on and do not want to leave it to any of my people." His mental and physical condition were not such as to render him incapable of transacting business. He sent the relinquishment back according to contract. I afterward closed the deal in compliance with this contract.

This is corroborated by witnesses not connected with the transaction. He told Squires he was going to sell his claim, "and never expected to go back to it." He told Wells, his physician, that he was "about to dispose of it [his entry] and as soon as he did he would settle up." He told D. C. Holmes, brother of Lobirta Holmes, "about a week or two before he left that if I would see that he got \$200 he would relinquish to me and turn over the papers." Oscar Leamon saw Van Buren have a relinquishment blank talking to Cox, but did not hear the particulars of the conversation. It so appears well established that Van Buren abandoned his homestead without intent to return to it, pending a contract to relinquish his entry for \$200, the detail of how much should be cash and how much on credit, or "note," was alone not settled. He took a relinquishment blank with him, failing to find an officer there before whom to execute it, and at Mineral Wells did execute it, and sent it to Cox for delivery, in consummation of a sale before made.

In *Orvis v. Banks*, *supra*, cited by you, one Goodvin made homestead entry, in Kansas, July 15, 1876, established residence with his

wife; they went to Nebraska for a visit in October, 1876, where he died February 5, 1877. September 18, 1876, before going on that visit, Goodvin's father, in his presence and by his authority, made relinquishment of the entry, which he left with his father, thereon the entry was canceled March 17, 1877, after the entryman's death; Banks filed preemption declaratory statement March 29, 1877, made settlement, and October 10, 1879, changed his preemption to a homestead. Mrs. Goodvin returned to Kansas in 1877, a few months after her husband's death, learned of the relinquishment, and asserted no rights until June 21, 1880, having remarried. By name of Mrs. Orvis she sought reinstatement of her deceased husband's entry. She was held barred by laches, though it was said the father's agency terminated by the entryman's death.

In *Confar v. Confar*, *supra*, the entryman died September 18, 1890, leaving a widow. The day before his death he made and delivered a relinquishment to a son by a former marriage, which the son filed November 11, 1890, with application for entry, and the widow, November 20, filed protest charging fraud. She prevailed, on the ground that the son's agency terminated by the father's death. The act was a fraud on the wife.

In *Robertson v. Messent's Heirs*, *supra*, in 1888 Messent gave one Chauvin relinquishment of a desert-land entry pending a contest. Chauvin filed a second and collusive contest. The first was dismissed and Chauvin's became senior. October 7, 1891, Robertson filed a third contest, with application for homestead entry. The application for entry was rejected, and on appeal was affirmed by your office, January 12, 1892, and trial on Chauvin's contest was set for April 30, 1892. April 27, 1892, one Bowden filed Messent's relinquishment, Chauvin dismissed his collusive contest, and Bowden's entry was allowed. Robertson also applied for entry, which was rejected, and his appeal came to the Department. It was shown that Messent died May, 1889, and Chauvin had contested to protect the entry, of which he held a secret relinquishment. Reinstatement of Messent's entry was directed, cancellation of Bowden's entry, and proceedings on Robertson's contest.

Neither the second nor third of these cases has such resemblance of facts as make them precedent for the present one. The first has some resemblance, but differs in that the relinquishment was not delivered to carry out and consummate a negotiation made by the entryman before his death. It is evident that had the widow, Mrs. Orvis, moved promptly, she would have prevailed, and failed only because equitably barred by laches. The present case is distinguishable from all the foregoing cited in that the relinquishment herein was delivered to effectuate a contract made by the entryman in his lifetime after

abandonment of his entry, with intent not to return thereto. In *Orvis v. Banks*, *supra*, Secretary Teller observed that:

I do not mean to say that a deed fully executed at the request of the grantee, and ready for delivery, if coming into the possession of the grantee without collusion or fraud even after death of the grantor, may not, when placed of record in good faith become effective to pass the title . . . The relinquishment not having been made effective by delivery prior to his death, could be, if brought to the notice of the Government, treated merely as evidence tending to show abandonment, but not conclusive thereof if it should be shown that he still remained upon the land and continued to comply in fact with the requirements of law.

The facts thus hypothetically stated by Secretary Teller are those that in this case exist. Van Buren negotiated sale of his improvements and relinquishment of it came to possession of the purchaser without collusion, or fraud, after Van Buren's death, and in good faith was placed of record by filing in the local office with no unreasonable delay. Van Buren had actually abandoned the entry with avowed intent not to return. All the facts existed that in view of the Secretary, expressed in *Orvis v. Banks*, would justify recognition of a relinquishment after the entryman's death.

A right in public lands obtained by entry or by mere possession is property recognized by decisions of the courts in every State and Territory in which there are or have been public lands. This is necessary to good order and social development of frontier settlements. Such rights are subject of barter and sale, and "as among the parties to such contracts they are valid." *Lamb v. Davenport* (18 Wall., 307, 314); *Tarpey v. Madsen* (178 U. S., 215, 221). While it is well settled that no right is secured by such contracts as against the title and right of the United States in and to the land, yet the United States may recognize a claim so arising and permit the purchaser to perfect his purchase and to acquire from the United States a complete title under any law authorizing disposal of the particular land. The relinquishment is merely evidence of abandonment, and that, with the other facts in this case, evidence actual abandonment, full and complete.

The heir has no equity. She is a mere successor by operation of law, parting with nothing, with no more equity than a voluntary grantee, subject to all equitable rights of others. Where an entryman has before death actually abandoned and sold his improvements and right, the heir takes nothing by succession, though the sale and abandonment vested no legal right in the vendee and the relinquishment merely restored complete title to the United States. In the present case, upon an actual, full, and complete abandonment by Van Buren, and relinquishment actually executed by him and given by him to another to be filed for his vendor, the entry was canceled. It

is not the ordinary case of agency where one appoints another to negotiate a transaction, but one where the transaction was concluded, the meeting of minds was complete and in consummation of it the relinquishment was handed over to a third party to be delivered, upon condition that the purchaser pay the agreed consideration. Neither the vendor nor heir can recall or disaffirm, except for fraud, and no fraud in this case existed. The heir has no right or equity for reinstatement of the entry. It having been canceled according to the evident intent and desire of the entryman, who had completely abandoned, the heir took nothing, and can not demand its reinstatement.

Your decision is reversed, the proceeding dismissed, and the entries will remain intact.

RECLAMATION—WATER RIGHT—MORTGAGE—SALE UNDER
FORECLOSURE.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., March 5, 1910.

The DIRECTOR OF THE RECLAMATION SERVICE.

SIR: Yours of January 13, 1910, in which recommendation is made that a regulation be promulgated in regard to lands under government irrigation projects which have been sold under foreclosure proceedings, has been considered and such regulation meets with my approval. You are therefore authorized to promulgate the following:

It is hereby ordered: Whenever in case of foreclosure of a mortgage given to secure a loan on land in private ownership for which charges are payable for a water right under a reclamation project, the mortgagor buys in the land, no steps will be taken to cancel the water right application on account of failure to maintain residence upon or in the neighborhood of the land, until the expiration of one year from the date of the foreclosure sale; provided that all charges that may be due or that may accrue during such interval be paid, and also that within such period of one year, a water right application for such land be filed by a qualified person who, upon submitting satisfactory evidence of transfer of title, shall be entitled to a credit equal to all payments theretofore made on account of the water right charges for said land.

It has been suggested that there should be some rule requiring that notice when a sale is so made shall be given to the Department.

Very respectfully,

R. A. BALLINGER, *Secretary.*

**HOMESTEADS IN NATIONAL FORESTS—SURVEY—DESCRIPTION—ACT
OF JUNE 11, 1906.**

That part of paragraph 8 of the circular of December 16, 1908, which provides for the patenting of forest homestead entries without the necessity of a special survey where the lands are described as "a quarter or a half of a surveyed quarter-quarter section or rectangular lotted tract" applies to legal subdivisions designated as lots only when they are true rectangles as shown by the plats of survey; and a special survey will be required of all claims not described in accordance with a strict construction of said paragraph.

Secretary Ballinger to the Secretary of Agriculture, March 8, 1910.

I am in receipt of your letter of January 31, 1910, requesting the construction by this Department of that portion of paragraph 8 of Land Office circular dated December 16, 1908 (37 L. D., 355), which provides for the patenting of forest homestead entries without the necessity of a special survey where the lands are described as "a quarter or a half of a surveyed quarter-quarter section or rectangular lotted tract." In your said letter you request to be advised as to whether this rule applies to legal subdivisions designated as lots, which are not true rectangles, and if so, to what degree they may vary therefrom.

The question raised is one which should be determined in advance for the good of both the applicant for lands under the act of June 11, 1906 (34 Stat., 233), and of the Government in passing upon such claims. You state that the Forest Service of your Department encounters much difficulty in the matter of listing agricultural lands within National Forests under the said act, where the lands applied for embrace only parts of legal subdivisions which are designated by lot numbers, and whose sides are straight lines. I quite readily realize the difficulty thus encountered by the Forest Service, and also by the General Land Office of this Department in patenting lands so described. Thus far, but very few claims of this nature have been patented, one of which called for 20 acres of a lotted subdivision, the S. $\frac{1}{2}$ of Lot 1, as shown in Example I of the accompanying diagrams. [Diagrams omitted.]

The claim referred to was patented under the description "the S. $\frac{1}{2}$ of Lot 1" without requiring a special survey at the entryman's expense, as required in certain cases specified in the act of June 11, 1906, and said regulations of December 16, 1908. The technical meaning was given this description, as applied to legal subdivisions in the division of a section as per Example I, wherein the excess or deficiency in area is made to affect only the northernmost tier of legal subdivisions. Hence, in applying the same technical rule to the case referred to, it would be construed to mean an exact 20-acre rectangle on the south side of Lot 1.

After careful consideration of the matter, however, I am of the opinion that it is neither safe nor proper to apply this technical rule to the description of such parcels of land and dispense with a special survey marking out the exact lines of the claim and showing the corners by substantial marked monuments. Any description which is ambiguous and which renders the area and location of the claim problematical, should not be given in the final certificate or patent. To do so would too frequently involve the parties in dispute as to boundary lines and lead to unnecessary litigation.

If the description be "the E. $\frac{1}{2}$ of Lot 1" or "the NE. $\frac{1}{4}$ of Lot 1," for example, as is frequently the case, the difficulty increases. The lots illustrated in Example I being trapezoidal, a line extending from the middle of the south side to the middle of the north would not divide the lot into two equal parts; and if a second line be likewise run east and west the north-east portion thus cut off would not embrace one-fourth the area of the lot. It is therefore evident that lands so described in the listing by your Department should be surveyed out and monuments set at the corners of such irregular tracts.

In sections the areas of which are greatly in excess of 640 acres, it often becomes necessary to divide the half-section into 3 or more tiers all of whose subdivisions are designated by lot numbers as indicated in Example II, herewith. Lots 5 to 12, inclusive, being exactly rectangular (theoretically), and in all respects similar to the legal subdivisions represented in the south half of each of the examples, may be divided into halves, quarters and sixteenths, and so patented, with the same propriety that a regular 40-acre subdivision may be so treated.

There appears to be no question as to the treatment of descriptions of irregularly-shaped lots meandering streams or bodies of water, or bordering mineral and other claims surveyed by metes and bounds, as shown in Example III. It seems to be accepted by all, that a special survey must be procured by the entryman before submitting final proof where the tract entered embraces a part only of such an irregularly-shaped lot.

In conclusion I have to state that that part of the said regulations referred to in your letter must be strictly construed as applying only to lots which are true rectangles as shown by the plats of survey. The law provides for the disposition of public lands by legal subdivisions only, except in a certain class of mineral claims and except the lands be surveyed by metes and bounds. It is therefore upon a loose construction of the law that lands entered under the act of June 11, 1906, are in any event passed to patent for parcels smaller than a legal subdivision without a special survey.

Hereafter, the Commissioner of the General Land Office will be guided by the above in passing upon final proofs submitted upon

entries made under the said act of June 11, 1906, and will require a special survey of claims where they are not described as permitted in paragraph 8 of said regulations of December 16, 1908, strictly construed.

Very respectfully,

R. A. BALLINGER,
Secretary.

ISOLATED TRACTS—ORDER OF SALE—SEGREGATION—NOTATION
UPON RECORDS.

ERIKSON *v.* HARNEY.

Isolated tracts do not become segregated upon application for sale until the order of the Commissioner authorizing such sale has been noted upon the records of the local office.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, March 12, 1910.* (G. C. R.)

Charles E. Harney has appealed from your office decision of October 21, 1909, which affirms the action of the register and receiver and holds for cancellation his homestead entry made September 24, 1908, for lots 3 and 4 (W. $\frac{1}{2}$ SW. $\frac{1}{4}$), Sec. 18, T. 33 N., R. 52 W., Alliance, Nebraska.

This action was taken on the following state of facts:

May 6, 1908, the local officers transmitted John R. Erikson's application to your office to have the land above described, together with the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 11, of said township, offered for sale as isolated tracts. Your office, by letter "C" of September 8, 1908, directed the local officers to proceed to offer the land for sale under the act of June 27, 1906 (34 Stat., 517).

According to report of the register and receiver, Harney's homestead application, filed September 22, 1908, was erroneously allowed—on account of congestion of business in this office and the accumulation of Commissioner's letters on account of the prolonged sickness of the clerk in this office who had charge of such matters.

In other words, your office letter directing sale of the land, assuming that it had then reached the local office, had received no attention, and when Harney's application was presented, the record showed the land subject thereto and his application was accordingly allowed.

Considering Harney's entry erroneously allowed, the register and receiver ordered a hearing and directed Harney to appear before them November 24, 1909, and show cause why his entry should not be canceled as in conflict with the order of your office to sell the land. On the day fixed, Harney failed to appear. Erikson with his attor-

ney was present. Without taking any testimony, the register and receiver and your office took the action herein appealed from.

Harney makes affidavit that he went on the land in good faith and has made his home there and made certain improvements. There is nothing to impeach his good faith. He entered the land, which the record showed was subject to entry.

In applying for the sale of the land as an isolated tract, Erikson also appears to have acted in good faith, and from all that appears in the record his application, proofs, etc., are regular.

From equitable considerations, however, it would appear that Harney, by reason of his entry, residence, improvements, etc., has a better right to the land.

Paragraph 22 of the regulations under the supplementary act of March 2, 1907 (34 Stat., 1224), relating to lands in Nebraska (37 L. D., 230) reads as follows:

An application for sale under these instructions will not segregate the lands from entry or other disposal, but such lands may be entered at any time prior to the time of receipt in the local land office of the letter authorizing such sale. Upon receipt of such letter the local officers will note thereon the time when it was received, and at once examine the records to see whether the lands or any part thereof have been entered. They will note on the tract book opposite such lands as are found to be clear that sale has been authorized, giving date of the letter. Such lands will then be considered segregated for the purpose of the sale. If the examination of the records shows that all of the lands applied for have been entered, the local officers will not promulgate the letter authorizing the sale, but will report the facts to this office, whereupon the letter authorizing the sale will be revoked.

The paragraph quoted is also identical with paragraph 8 of the instructions of December 27, 1907 (36 L. D., 216), under the act of June 27, 1906 (34 Stat., 517), amending section 2455, Revised Statutes, and relating to sale of isolated tracts in states other than Nebraska.

Isolated tracts do not become segregated upon application for sale until notation on the records opposite the lands has been made that authority has been given to sell. "Such lands will then [not before] be considered segregated for the purpose of sale," and cannot after such notation be properly entered.

Although your office letter authorizing the sale of the land in question appears to have been in the local office when Harney's entry was allowed, the tract books did not show it, nor was the fact apparently known even to the local officers.

It follows, both from regulations of the Department and from equitable considerations, that Harney, by virtue of his entry, has a better right to the land.

It may be added that the unfortunate situation involved in this case is due to the neglect of the local officers, whose excuse therefor

is not satisfactory. Notations on tract books showing changed status of lands should be immediately made irrespective of other matters to avoid embarrassment to innocent parties depending upon the correctness of those records.

Attention is called to the fact that Harney has applied to enter lots 1 and 2 of section 19 of same township, as contiguous to his existing entry, these lots having recently become public lands through relinquishment of former entry.

No reason appears why sale of the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 11, of said township may not now be had as per the order of your office on Erikson's application.

For reasons above given, the action appealed from is reversed.

GERARD AND MCKEE SCRIP—LOCATABLE ONLY UPON SURVEYED LAND.

INSTRUCTIONS.

Gerard and McKee scrip may be located only upon surveyed land.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, March 14, 1910.* (J. H. T.)

You have submitted to the Department for consideration a letter of inquiry presenting the question whether McKee scrip may be properly located upon unsurveyed lands. You state that no general instructions relative to this scrip have ever been issued.

The act of January 25, 1853 (10 Stat., 745), for the relief of the widow and orphan children of Colonel William R. McKee, provides in part as follows:

That to each of the orphan children of the said McKee, there shall be, and hereby is, granted one quarter section of land, to be located upon any vacant land of the United States, and to be located where and in such manner as the President of the United States shall direct.

The amendatory act of March 1, 1889 (25 Stat., 1307), provided:

That the Commissioner of the General Land Office, to carry into effect the grant of one-quarter section each to the orphan children of Colonel William R. McKee, made in the second section of said act, be, and he is hereby, authorized and directed to issue to the surviving children and grand children of said McKee, or the owners and holders thereof, other certificates for those they now hold, issued by authority of said act, which new certificates they may enter and locate for themselves upon any lands in satisfaction of said grant of the class described in the act to which this is an amendment.

From your recital of the records of your office, it appears that there are six forty-acre pieces of this scrip outstanding. You also state that two pieces of forty acres each have been located on unsur-

veyed lands in New Mexico, and that by your letter of August 20, 1906, said locations were recognized as being legal.

In the case of *State of Florida v. Santa Fe Pacific Railroad Company* (37 L. D., 118), the question whether Palatka scrip could properly be located upon unsurveyed lands was considered. The act of June 9, 1880, (21 Stat., 171), under which said scrip was issued, authorized selections of "an equal quantity of land from any of the vacant and unappropriated public lands of the United States in Florida." In the above said decision it was stated:

Public land can be disposed of only after survey. By express acts of Congress in certain cases rights to enter lands may be located in advance of surveys but such locations necessarily remain unexecuted by patent until the lands are identified by survey and proper descriptions can be given. Such locations in advance of surveys must be made to conform to survey lines when made. But except by special authority of Congress no rights are or can be recognized by the land department to arise from attempted scrip locations in advance of surveys. There was in the act no authority express or necessarily implied to make location of the Palatka scrip on unsurveyed lands and it necessarily follows that the words "vacant and unappropriated lands" must be read in the light of the general legislation of Congress and means only surveyed lands subject to disposal by other ordinary forms of entry.

The above ruling applies with equal force to McKee scrip.

You have called attention to the instructions concerning Gerard scrip under the act of February 10, 1855 (10 Stat., 849). Said act provided that the heirs of Joseph Gerard might enter—

each one of them severally, or his or their heirs, one section of the public lands, without the payment of any consideration for said three sections, being in full payment for the patriotic services of said Joseph Gerard.

October 25, 1880, your office issued circular instructions under the said act, stating that—

unsurveyed lands can not be taken up in satisfaction thereof, said act and the certificate issued thereunder authorizing the location of "one section" of the public lands, or parts of one section, thereby restricting locations to the class of surveyed lands which only are laid off in sections and parts of sections.

The Department concurs in the above ruling relative to Gerard scrip, and believes that the same reasoning applies to McKee scrip. It is therefore held that neither Gerard scrip nor McKee scrip can properly be located upon unsurveyed lands. However, in view of the fact that no instructions have heretofore been issued relative to McKee scrip, and the further fact that the two portions of said scrip mentioned by you have been recognized as properly located and have been allowed to remain intact for such a length of time without question, they will not now be disturbed if otherwise proper.

MILITARY BOUNTY LAND WARRANT—PROOF OF OWNERSHIP—PRESUMPTION OF OWNERSHIP.

T. E. RAMSEY.

Decrees of courts adjudging the title to military bounty land warrants will be accepted as evidence of ownership where the court had jurisdiction of the subject-matter and the parties, and should, as a general rule, be required in the absence of a written assignment from the warrantee; but the requirement is not absolute, and the validity of an assignment may be established by such proofs as will create reasonable presumption of ownership in the last holder of the warrant.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, March 14, 1910.* (E. F. B.)

By decision of November 17, 1909, you held for cancellation location made by T. E. Ramsey of the NW. $\frac{1}{4}$, Sec. 35, T. 4 S., R. 9 W., Jackson, Mississippi, with duplicate of military bounty land warrant, No. 56276, to Clark Hamil, private Captain Bailey's Company, Georgia militia, Creek war, for want of sufficient evidence of title in the locator to the warrant. He was allowed sixty days in which to perfect his title to the land or to substitute another warrant, and was notified that in default thereof the location would be canceled.

Appellant originally located said tract November 22, 1906, with military bounty land warrant No. 38193, issued to John Crossett, private in Captain Haskins's Company, New York militia, which was held for cancellation because of insufficient evidence of title, but he was allowed to substitute another warrant for said location. Thereafter substitution was made with a duplicate of the bounty land warrant issued to Clark Hamil, as aforesaid. Said duplicate was issued by the Commissioner of Pensions January 6, 1906, upon the application of John T. Wood, administrator of the estate of John H. Wood, and was delivered to his representative.

You rejected the substitute for the reason that there is not sufficient evidence of an assignment of the warrant from the warrantee to John H. Wood, through whom the locator claims title, and you held that "in default of a written assignment from the assignee a decree of title must be obtained from a court of competent jurisdiction and a transcript thereof appended to the reissued warrant," as required by rule 39 of the circular governing location and assignments of bounty land warrants (27 L. D., 218).

That rule is not absolute, although there may be no evidence in writing of an assignment from the warrantee.

The purpose of the rule is to satisfy the Government that the object of its bounty has received the benefit intended to be conferred, and to that end it may in every case require a decree of a court of

competent jurisdiction as to the validity of the original transfer, in the absence of other satisfactory proof. But "reasonable presumptions may be indulged in favor of a title by possession of the warrant for a long period, where lapse of time has made the production of positive proof as to the owner and circumstances under which it was acquired impossible, unless there are circumstances tending to discredit or cast suspicion upon title of such holder." S. I. Jones (37 L. D., 607).

Decrees of courts will be accepted as evidence of ownership where the court had jurisdiction of the subject-matter and the parties, and such degree of proof should, as a general rule, be required in the absence of a written assignment from the warrantee, but the rule is not absolute and the validity of an assignment may be established by such proofs as will create reasonable presumption of ownership in the last holder of the warrant.

In this case proofs are not wanting of the assignment of the warrant by the warrantee. The duplicate warrant was issued by the Commissioner of Pensions upon such proofs as satisfied him that John H. Wood was the *bona fide* owner of the original warrant by assignment from Clark Hamil the warrantee at the time it was lost or destroyed, and that his legal representative was entitled, under the law, to have the duplicate of such warrant issued in his right and delivered to him, or his legal representative.

The application was made by Joseph P. Wood, as administrator of the estate of John H. Wood, who filed therewith his affidavit stating that land warrant No. 56276, issued to Clark Hamil, private Captain Bailey's Company, Georgia volunteers, Creek War, was duly assigned by Clark Hamil to John H. Wood about the year 1857, and was sent by said assignee to Joseph F. Bussey who lost said warrant. He submitted in support of his petition a certified copy from the records of your office of a letter from said John H. Wood, written May 5, 1860, in the nature of a *caveat* against the location of the original warrant, in which he stated that land warrant No. 56276, issued February 14, 1857, to Clark Hamil, private in Captain Bailey's Company, Creek War, had been transferred to him by said Clark Hamil and was sent by him to Joseph F. Bussey who lost the warrant, also a certified copy of the affidavit of Joseph F. Bussey, executed in Drew County, Arkansas, February 8, 1859, inclosed with and referred to in said letter, in which affiant stated that "he lost or mislaid a certain warrant which was issued to Clark Hamil, private in Captain Bailey's Company, Creek War, No. 56276, issued 14th February, 1857, for one hundred and sixty acres transferred by the said Hamil to John H. Wood, of Chambers County, Alabama."

That letter, with the accompanying affidavit, which was acknowledged May 26, 1860, was filed in your office and upon the back thereof

is the following endorsement: "John H. Wood, Buck Horn, Alabama, May 5, 1860, files caveat to arrest the issue of patent on warrant 56276 for 160 acres, act 1855."

The apparent genuineness of the letter and affidavit, written so soon after the issuance of the warrant, describing the lost warrant with such particularity and accuracy and being a matter of record in your office for more than forty-five years, satisfied the Commissioner of Pensions that the statements made therein were true and that the said Joseph F. Bussey was in possession of said warrant prior to February 8, 1859, as agent of John H. Wood, to whom the same had been duly assigned by Clark Hamil, the warrantee, and that said warrant, while in the possession of the agent of Wood, was lost or mislaid.

These facts were necessarily found by the Commissioner of Pensions in determining that the duplicate warrant should issue upon said application, and the testimony therewith submitted was amply sufficient to warrant that finding.

The Commissioner of Pensions has no authority to issue a duplicate of a warrant that had been satisfied, and such act would be a nullity, but where a warrant properly issued has not been located and has been lost or destroyed, it is within the jurisdiction and authority of the Commissioner of Pensions to determine every fact necessary to entitle the applicant to the issuance of a duplicate, whether the application be made by the warrantee or by one claiming to hold under assignment. Roy McDonald (37 L. D., 39).

Such determination would not affect the right of an adverse claimant who had no opportunity to be heard, and your office would have jurisdiction to determine as to the true owner of the warrant upon an application to locate it. But as between the United States and the holder of a warrant in whose favor an adjudication has been made by the Commissioner of Pensions, his title is *prima facie* established and, in the absence of proof sufficient to overcome the same, it is entitled to recognition by your office upon an application to locate it.

Your decision is reversed and you will allow the location to be completed, if proper in all other respects.

PHILIP CONTZEN.

Motion for review of departmental decision of December 14, 1909, 38 L. D., 346, denied by First Assistant Secretary Pierce, March 14, 1910.

HOMESTEAD ENTRY—DEATH OF ENTRYMAN—RIGHT OF WIDOW.

HEIRS OF MOJCK *v.* WIDOW OF MOJCK.

Upon the death of a homesteader prior to consummation of his claim his widow, if there be one, succeeds under the homestead law to his right to the land; and the State courts have no jurisdiction to interfere with or divert the succession so fixed by federal statute.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, March 16, 1910.* (J. R. W.)

R. H. Molitor, attorney for heirs of Erhard Mojck, appealed from your decision of October 9, 1909, rejecting claim of the heirs of Erhard Mojck to succession of his homestead entry for NW. $\frac{1}{4}$, Sec. 23, T. 97 N., R. 71 W., 5th P. M., Gregory, South Dakota.

November 1, 1904, Erhard Mojck made homestead entry for the land. Commutation proof was submitted by Christina Mojck, as widow of Erhard Mojck, January 5, 1909, and cash certificate issued to heirs of Erhard Mojck, the certificate stating that "Heirs of Mojck shall be entitled to receive a patent." Your decision held that this was irregular as to form and contrary to instruction of general circular of January 25, 1904 (page 15). The local office was instructed by you, July 1, 1909, to correct the certificate to read as issued to Christina Mojck, widow of Erhard Mojck. August 27, 1909, R. H. Molitor, attorney, transmitted you a record of certain probate proceedings, recorded in Gregory County, South Dakota, assuming to fix the succession upon the widow and heirs. You held that this had no effect upon the right of succession vested in the widow by the homestead laws. The appeal contends:

This widow enjoyed a privilege which she has the right to waive and which she unquestionably did waive by her apparent release of all rights in the homestead in its entirety after her husband's death, and her acquiescence in such release for a long period of time, and failing to raise an issue concerning her rights in the probate proceedings instituted after her husband's death, and prosecuted to finality since, and her apparent willingness to share as an heir as appears from the decree of the County Judge per certified copy thereof made a part of this appeal.

The probate court of South Dakota had no jurisdiction to interfere with or divert the succession fixed by the homestead law. In *McCune v. Essig* (199 U. S., 382, 389) the court, in construing the homestead law, says as to a homesteader:

He may reside upon and cultivate the land, and by doing so is entitled to a patent. If he die his widow is given the right of residence and cultivation, and "shall be entitled to a patent as in other cases." He can make no devolution of the land against her. The statute which gives him a right gives her a right. She is as much a beneficiary of the statute as he. The words of the statute are

clear, and express who in turn shall be its beneficiaries. The contention of appellant reverses the order of the statute and gives the children an interest paramount to that of the widow through the laws of the State.

The law of the State is not competent to do this.

Mrs. Mojck as widow of the entryman is successor under the federal statute. The succession can not be diverted or defeated, except by some express act of hers. None appears in the record.

Your decision is affirmed.

**SELECTION OF UNSURVEYED LANDS—DESCRIPTION—CIRCULAR OF
NOVEMBER 3, 1909, NOT RETROACTIVE.**

HANSON ET AL. v. NORTHERN PACIFIC RY. CO.

The requirement in the circular of November 3, 1909, that in making selections of unsurveyed lands they shall be described by metes and bounds, with courses, distances, and reference to monuments by which the location thereof on the ground can be readily and accurately ascertained, will not be given retroactive effect; and selections made prior thereto will not be held defective as to description where the tracts selected are designated, in accordance with the practice then prevailing, as "lands which when surveyed will be described as follows," setting forth an approximate description of the tracts by section, township, and range.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, March 16, 1910.* (G. B. G.)

By decision of September 5, 1908 (37 L. D., 135), this Department, in deciding in favor of the Northern Pacific Railway Company certain issues involved in that case upon the conflicting claims of said company, the State of Idaho, and certain settlers to lands in township 44 north, range 3 east, Coeur d'Alene land district, Idaho, held, among other things (syllabus):

The fact that lands were classified as mineral under the act of February 26, 1895, will not prevent selection thereof by the Northern Pacific Railway Company under the provisions of the act of March 2, 1899, if otherwise within the terms of that act The question as to the character of land for which selection is tendered by the railway company under the act of March 2, 1899, is solely between the Government and the company, and where no protest is lodged against a selection *prima facie* regular and in accordance with the terms of the act upon the ground that the land selected is mineral in fact, and was known to be such at the time of selection, the company will be permitted to perfect its claim.

August Hanson was one of the settler claimants whose rights were adversely affected by that decision, his claim being for the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 21 of said township, and he moved a review thereof upon several grounds, only two of which were regarded as of sufficient importance by this Department

to entitle him to further consideration. Accordingly, June 9, 1909, his motion for review was entertained, the order therefor inviting argument upon two questions: (1) alleged insufficient description by the company in making its selection of these lands, and (2) the allegation that a new base was substituted after the original selection was made and after Hanson had initiated his settlement claim to said land.

In a supplemental argument filed in support of this motion it is admitted, and the fact appears to be, that there was no substitution of base, as alleged, affecting the tract of land claimed by Hanson and only one pertinent question raised by the motion is left for present consideration. This is the question of the alleged insufficiency of description. The only description given by the railway company of lands selected herein was of "lands which when surveyed will be described as follows," etc. There were no monuments upon the ground and no location of the land by reference to natural monuments, and nothing to give notice to settlers that the land had been appropriated by selection under the act of March 2, 1899. At the time this motion was entertained this Department had grave doubts as to the sufficiency of such description as against the claim of a settler subsequently initiated, and there was under contemplation then the formulation of regulations which would give more precision to such selections and afford settlers greater security in the matter of initiation of claims for such lands. Since that time that subject has been carefully considered by the Department and regulations have been issued which will give such precision and afford such security. [Circular of November 3, 1909, 38 L. D., 287.] It appeared, however, that the practice of allowing selections by the railway company as these selections were made had been of such long standing and such uniform practice that it would be unfair, if not illegal, to give retroactive effect to such regulations.

Since this motion was entertained numerous cases involving that question have been before the Department, and railway company selections have been sustained. The Department therefore can not extend any relief in this case. All the other questions raised by this motion were either carefully considered in the decision under review or have been so often determined by this Department in other cases that further discussion thereof would be profitless.

In a supplemental brief recently filed on behalf of Hanson the attention of this Department is called to a recent decision of the Circuit Court for the District of Montana in the case of *United States v. Northern Pacific Railway Company et al.* (170 Fed. Rep., 498), which is alleged to be authority for the contention that odd-numbered sections within the Northern Pacific land grant classified as mineral under the act of February 26, 1895 (28 Stat., 683), are not

subject to lieu selection by the Northern Pacific Railway Company under the act of March 2, 1899. The case cited is not in point and is not authority for the contention made. That case merely held that mineral lands are not subject to selection by said company under that act, even though they were returned as nonmineral by the Government survey. There is no allegation that the lands here in controversy were or are mineral lands, and the applicability of the case cited is not perceived.

The motion is denied.

**RIGHT OF WAY—JURISDICTION—SUIT TO CANCEL INADVERTENT
APPROVAL.**

T. A. SULLIVAN.

Upon approval by the Department of an application for right of way under the act of March 3, 1891, jurisdiction is lost, and the Department may not thereafter properly approve another application which conflicts to a material extent with the approved application.

Where an application for right of way was inadvertently approved during the pendency and without consideration of a conflicting application under which superior rights are claimed, the Department may recommend the institution of suit to cancel the approval and reacquire jurisdiction for the purpose of determining to which of the rival applicants the right of way should be awarded.

*First Assistant Secretary Pierce to the Commissioner of the General
(O. L.) Land Office, March 17, 1910. (S. W. W.)*

This case involves the application of T. A. Sullivan for a right of way under the act of March 3, 1891 (26 Stat., 1095), for a canal from a point on the Owyhee River in unsurveyed T. 32 S., R. 42 E., to a point in Sec. 16, T. 31 S., R. 41 E., Burns, Oregon, land district, and is before the Department upon the appeal of Sullivan from your office decision of October 21, 1909, refusing to recommend the approval of his application because of conflict with a prior application which has been approved.

It appears from the record and your said decision that on February 7, 1907, the application of George B. Rogers and Peter M. Davis for a reservoir under the said act of 1891 was approved by the Department upon the recommendation of your office, the same having been filed in the local land office July 24, 1906; that on January 23, 1907, some fifteen days prior to the approval of the application of Rogers and Davis, Sullivan filed his application in the local office which is said to conflict in part with the Owyhee reservoir for which application was filed by Rogers and Davis; and that the application of Sullivan was not forwarded to your office until in November, 1908.

Your decision under consideration holds that it is the policy of your office not to recommend any suit to set aside and declare forfeited a right of way approved under the provisions of the act of 1891 prior to the expiration of the period of five years allowed by section twenty of said act for the construction of the project, in view of which you declined at the present time to take any further action looking to the forfeiture of the grant made to Rogers and Davis, and inasmuch as the existence of that grant of right of way precluded the allowance of Sullivan's application, you held the latter for rejection subject to the right of appeal.

It is urged in the appeal that the interests of the appellant have been prejudiced and jeopardized through the gross neglect of the register and receiver in failing to forward the application promptly to your office; that the application of Rogers and Davis was allowed and approved contrary to law, the regulations, and the decisions; that the rights of Sullivan are superior to those of Rogers and Davis, and that it is within the authority of the Secretary of the Interior to grant Sullivan's application, notwithstanding the prior approval of the conflicting claim of Rogers and Davis.

It is alleged that Rogers and Davis did not comply with the requirements of the State law respecting the manner of proceeding to acquire water rights, while Sullivan in fact did comply with the requirement of the State's law in that regard; that he had so complied with the requirement of the State's law on July 5, 1906, which was prior to the filing of the application of Rogers and Davis in the local office on July 24, of that year.

It is further alleged that neither Rogers and Davis, nor their assignee, C. B. Hurtt, have ever done any work on their project, while Sullivan has expended about twenty thousand dollars in actual construction. These allegations are, in a measure, corroborated by reports made by a special agent of your office and inspectors of the Reclamation Service.

The act of March 3, 1891, under which the application of Rogers and Davis was filed and approved, is essentially similar to the act of March 3, 1875 (18 Stat., 482), by which rights of way across the public land are granted to railroad companies, respecting which the Supreme Court has decided that after an application has been approved by the Secretary of the Interior, a vested right is acquired which can not be disturbed by any subsequent action of the Department; that with the approval the title passes, and with the title passes all authority or control of the executive department over the land and over the title which it has conveyed (*Noble v. Union River Logging Railroad Co.* (147 U. S., 165)).

Applying the rule announced by the Supreme Court in the above cited case to applications for rights of way under the act of 1891,

this Department has held that by the approval of such an application the jurisdiction of the Department is lost, and that any subsequent action taken looking to the cancellation or annulment of the right of way must be by direct action for that purpose; and in the same connection it has been held further that the Department may not properly approve an application subsequently filed, which conflicts to a material extent with an approved application under which vested rights have been acquired. (*Allen et al. v. Denver Power and Irrigation Co.* (38 L. D., 207).)

From what has been stated it follows that the Department may not properly approve the pending application of Sullivan until jurisdiction has been again acquired over the land involved within the prior approved application of Rogers and Davis, and the request of the appellant in that regard must be denied.

However, it has been determined by the Supreme Court that when, while disputed matters of fact concerning a tract of public land or the priority of claimants thereto are pending unsettled in the land department, a patent wrongfully issues for the tract, through inadvertence or mistake, by which the jurisdiction conferred by law upon the land department over these disputed questions of fact is lost, a court of equity may rightfully interfere and restore such lost jurisdiction by cancelling the Patent. (*Germania Iron Co. v. United States* (165 U. S., 379).)

As shown above, the application of Sullivan was filed in the local land office on January 23, 1907, and it was not until February 7, following, that the application of Rogers and Davis was approved by the Department. The Department had no notice of the pending application of Sullivan and consequently could not inquire into the respective rights of the conflicting claims.

This being so, it follows that the approval granted to Rogers and Davis was obtained through inadvertence or mistake, and that a suit will lie looking to the cancellation of the grant made to Rogers and Davis, to the end that the Department may again acquire jurisdiction over the land involved for the purpose of determining to whom the right should in justice be granted.

Your office will accordingly notify Rogers and Davis and their assignees, that they will be allowed a reasonable time, to be fixed by your office, within which to relinquish or reconvey to the United States all rights acquired to the land in conflict under and by virtue of the approval granted February 7, 1907; and that in the event of their failure to show good cause why this should not be done, the Department will, upon their refusal to reconvey, institute proceedings looking to the cancellation of the approval.

Your office decision is modified accordingly.

RAILROAD GRANT—DEFINITE LOCATION—EFFECT OF RESERVATION
BY MILITARY AUTHORITIES.

NORTHERN PACIFIC RY. CO.

A reservation of public lands by the military authorities operates as a segregation thereof; and no rights attach thereto under a railroad grant upon the subsequent definite location of the line of road.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, March 17, 1910.* (G. B. G.)

This is a motion on behalf of the Northern Pacific Railway Company for review of departmental decision of March 7, 1910, not reported, which affirmed your office decision of February 15, 1910, denying the claim of said company to 64,000 acres of land falling within the place limits of the grant made to said company by the act of July 2, 1864 (13 Stat., 365), because of its inclusion within the Spokane Indian Reservation, and holding that said lands are subject to disposition under the act of May 29, 1908 (35 Stat., 458).

The decision of your office and that of the Department in affirmance thereof were put upon the ground mainly that although the line of the company's road coterminus with and opposite the land in question was definitely located October 4, 1880, the company's right did not attach as of that date, because of a reservation of said lands, September 3, 1880, by H. H. Pierce, First Lieutenant, 21st Infantry, by command of Brigadier-General Howard, proclaimed in special field order No. 8, headquarters Department of the Columbia, in the field, Spokane Falls, Washington, the withdrawal being made in contemplation of a reservation for the Spokane Indians, said withdrawal being based upon what was said to be plain necessity to preserve the peace until the pledge of the Government theretofore made to these Indians to preserve said lands for their use should be fulfilled or other arrangements accomplished.

Upon the motion it is urged that said order did not have the effect of withdrawing said lands, and argued at considerable length that the railroad company's rights attached thereto upon the definite location of its road. The case of *Buttz v. Northern Pacific Railroad Company* (119 U. S., 55), which is the main reliance of the company in support of its contention, is not in point. The lands involved in that case were what is known as Indian country, and there was not involved the effect of an authorized withdrawal, and all that the court there held which is pertinent to the question here presented was that that part of section 3 of the act of July 2, 1864 (13 Stat., 365), which excepts from the grant lands reserved, sold, granted, or otherwise appropriated, and to which a preemption and other rights and claims have not attached, when a map of definite location has been filed, does not include the Indian right of occupancy within such "other rights and claims."

The question here presented is entirely different, and is more nearly the same as that considered by the Supreme Court of the United States in the case of *Scott v. Carew* (196 U. S., 100), wherein it was held that the establishment of a military post, under proper orders, on public lands amounts to an appropriation of the land for military purposes and withdrawal of the property occupied from the effect of general laws subsequently passed for the disposal of public lands, and that no right of an individual settler attaches to or hangs over the land to interfere with the action of the Government in regard thereto. At page 114 of the decision it was said:

Quite a number of reservations and posts in our western territory once established have afterwards been abandoned, and while so appropriated they are excepted from the operation of the public-land laws, and no right of an individual settler attaches to or hangs over the land to interfere with such action as the Government may thereafter see fit to take in respect to it. No cloud can be cast upon the title of the Government—nothing done by an individual to embarrass it in the future disposition of the land.

If this be true of a settlement claim, it is with better reason true of the attachment of rights under a railroad land grant. The Secretary of War, acting through Brigadier-General Howard and Lieutenant H. H. Pierce, was exercising a proper function of Government in making a temporary withdrawal or reservation of these lands for the preservation of peace. If this had not been done it is more than probable that the encroachment of intended settlers upon these lands would have precipitated a race conflict, and this is what said order was intended to prevent.

All the questions advanced in support of this motion, although not fully stated in the decision under review, were fully considered at the time said decision was rendered.

The motion is therefore denied.

ADDITIONAL HOMESTEAD UNDER SECTION 3 OF THE ACT OF
FEBRUARY 19, 1909.

CLINTON BROWNING.

A homesteader who made entry under the general law, upon which patent has issued, is not entitled to an additional entry under section 3 of the act of February 19, 1909.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, March 18, 1910.* (E. L. C.)

Clinton Browning has appealed from your office decision of December 14, 1909, in which you reject his application filed May 19, 1909, to make an additional homestead entry under section 3 of the

act of February 19, 1909 (35 Stat., 639), for the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 19, T. 4 S., R. 42 W., and the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 24, T. 4 S., R. 43 W., 6th P. M., as additional to his homestead entry 1548, made February 2, 1899, for the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 19, T. 4 S., R. 42 W., Sterling, Colorado, for the reason that his original entry had been patented and he was not entitled to additional entry under said act of February 19, 1909. Defendant has prosecuted his appeal in person and the grounds therefor are set forth as follows:

Ground for appeal is that sec. 3 of the act to provide for enlarged homestead reads that any homestead entryman upon which final proof has not been made shall have the right to enter public lands, subject to the provisions of this act, but sec. 3 of this act does not say that every one who has made final proof can't take an additional homestead under this act, and no place else in the act that I can find.

Section 3 of the act of February 19, 1909 (35 Stat., 639), provides as follows:

That any homestead entryman of lands of the character herein described upon which final proof has not been made, shall have the right to enter public lands, subject to the provisions of this act, contiguous to his former entry, which shall not, together with the original entry, exceed three hundred and twenty acres, and residence upon and cultivation of the original entry shall be deemed as residence upon and cultivation of the additional entry.

It is clear from this section that any homestead entryman who has made entry under the general homestead laws, if he has not submitted final proof and is otherwise qualified, is entitled to the benefits of this act and may make an additional entry of such an amount of land as, together with his original entry, will not exceed 320 acres. While it is true that this section does not expressly prohibit an additional entry where a patent has been issued, yet the first section of the act provides "that any person who is a qualified entryman under the homestead laws of the United States may enter," etc. If, therefore, the entryman, as in this case, had made entry under the homestead laws and had received a patent for the land entered, he would not then be a qualified entryman under the homestead laws. Under circular of December 14, 1909 (38 L. D., 361), the Department in construing said act stated:

A person who has since August 30, 1890, entered and acquired title to 320 acres of land under the agricultural land laws (which is construed to mean the timber and stone, desert land, and homestead laws), is not entitled to make entry under this act; neither is a person who has acquired title to 160 acres under the general homestead law entitled to make another homestead entry under this act, unless he comes within the provisions of section 3 of the act providing for additional entries of contiguous lands, or unless entitled to the benefits of section 2 of the act of June 5, 1900 (31 Stat., 267), or section 2 of the act of May 22, 1902 (32 Stat., 203).

Said circular of December 14, 1909, pertaining to section 3 of said act, provides that:

Entrymen who made final proof on the original entries prior to the date of the act or prior to the classification or designation of the lands as coming within the provisions of the act are not entitled to make additional entries under this act.

In the present case the defendant does not show that he comes within the provisions of either of the acts referred to in the first paragraph above quoted. It appears that he made his first entry under the general homestead laws, and his entry having been patented, he does not come within the provisions of section 3 of the act of February 19, 1909, *supra*.

Your decision is therefore correct and the same is accordingly hereby affirmed.

PUBLIC LANDS—AGGREGATE AREA—ACT OF AUGUST 30, 1890.

COURTIER v. HOGAN.

Lands embraced in entries made prior to the act of August 30, 1890, or in settlements made prior thereto and subsequently carried to entry, are not considered in determining the quantity of lands a settler or entryman may acquire under the limitation in that act that not more than 320 acres in the aggregate may be acquired by any one person under the public land laws.

First Assistant Secretary Pierce to the Commissioner of the General (O. L.) Land Office, March 18, 1910. (S. W. W.)

This case involves the construction of the act of August 30, 1890 (26 Stat., 391), limiting the quantity of lands to which title may be acquired under the general land laws, and is before the Department on the appeal of Lillie I. Courtier from your office decision of July 2, 1909, sustaining the action of the local officers dismissing her contest against desert land entry No. 1611, made December 24, 1906, by John T. Hogan, for the S. $\frac{1}{2}$, Sec. 12, T. 1 N., R. 60 W., containing 320 acres, in the Denver, Colorado, land district.

The affidavits upon which this contest is based charged that John T. Hogan was not qualified to make the entry, for the reason that he had, on August 20, 1903, received final certificate on timber culture entry No. 9649, embracing the W. $\frac{1}{2}$ SE. $\frac{1}{4}$ and S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 5, T. 2 N., R. 61 W., 6th P. M., and had on June 1, 1903, made homestead entry No. 21598, for the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 6, W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 7, said township, upon which final proof was offered July 21, 1903.

From the evidence submitted in this case, it appears that on April 11, 1887, Hogan filed preemption declaratory statement embracing the land which he afterwards entered under the homestead entry

above described, and that at the time of filing his declaratory statement he immediately made settlement and established residence, after which he continued to reside upon and remain continuously in the possession of the land from the time of making settlement until the date of making final proof. There is no dispute as to the facts, and the only question for consideration is one of law, as to the proper construction of the act of August 30, 1890.

Your office, in disposing of the question, discusses the same at length, and cites the opinion of the Attorney-General and the instructions of the Department based thereon, found in 12 L. D., pages 81 to 83. You hold that, inasmuch as both the timber culture entry and the homestead entry made by Hogan were initiated prior to the passage of the act of August 30, 1890, the lands acquired thereunder are not to be considered in the aggregate of lands to which Hogan is entitled to acquire title under said act of 1890.

The act in question provides as follows:

No person who shall, after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry, or settlement is validated by this act.

It will be seen that the language of this act is not as clear as it might be, and the question arising is not entirely free from doubt. The Department is in thorough accord with the opinion approved by the Attorney-General, referred to above, respecting the disposition of the case presented to him at that time, because the entries in question had been completed prior to the passage of the act of 1890; and the only question was whether or not a person who had acquired title to 320 acres of land or more prior to the passage of the act could after its passage acquire 320 acres more.

It is manifest that the case presented to the Attorney-General was not the case now before the Department. Even the right of Hogan to complete the entries initiated by him prior to the act of 1890 is not questioned, but the question is whether or not the quantity of lands embraced in such entries which were completed subsequent to the passage of the act is to be considered in determining the quantity of land he is entitled to acquire after the passage of the act.

As above stated, the question is not free from doubt, and the Department has not in any adjudicated case held that lands acquired after the passage of the act through entries initiated prior to its passage should not be included in considering the quantity to which a person is entitled under the act of 1890. On the contrary, the Department has, in one case, at least, expressly held that lands so acquired are to be computed, and that the act was not intended to

exclude such lands, but merely to authorize the completion of all entries lawfully made prior to its passage.

However, it has been learned that your office has construed the Attorney-General's opinion above cited to mean that lands included in entries made prior to the passage of the act, or lands upon which settlement was made prior to the passage of the act which afterwards ripened into entry, are not to be considered in determining the quantity of lands which such settler or entryman might acquire since the act of 1890 was passed; and as the general circular respecting homestead entries is so worded as to probably justify this practice; and in view of the further fact that it is highly improbable that many cases will arise in future, the Department is not disposed at this time to disturb such practice.

Your decision is accordingly affirmed.

**MILITARY BOUNTY LAND WARRANT—ASSIGNMENT—RIGHTS OF
WIDOW OR HEIRS OF WARRANTEE.**

A. J. CONOLY.

Any attempted transfer of title to a military bounty land warrant, by gift or otherwise, prior to its location, not in compliance with the act of March 22, 1852, requiring assignments of such warrants to be in writing, will not deprive the widow or heirs of the warrantee of the interest and right to such warrant secured to them by statute.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, March 19, 1910.* (E. F. B.)

This appeal was filed by A. J. Conoly from the decision of your office of January 20, 1910, holding for cancellation a location made by him January 14, 1907, upon the W. $\frac{1}{2}$ SE. $\frac{1}{4}$, S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 24, T. 8 S., R. 8 E., Gainesville, Florida, with military bounty land warrant, No. 81494, issued July 13, 1858, to John D. Fuller, private Captain Roads's Company, New York Militia.

Appellant claims title to said warrant under an assignment from Maria E. Spink to L. E. Lee, and from Lee, through mesne assignments, to appellant. There is no written assignment from the warrantee, but with the papers in the case there is an affidavit by Maria E. Spink, who states that she is the daughter of John D. Fuller, the warrantee, who died in 1879, at the age of seventy; that in 1861 her father gave the warrant to affiant and she has been in the undisturbed possession of the same ever since.

This location was originally held for cancellation by decision of your office of December 3, 1898. At that time the locator submitted in support of his title a certified copy of the decree from the county

court of the State and county of Denver, Colorado, in the suit of Frank H. Reger *v.* the unknown heirs of John D. Fuller, adjudging that plaintiff is the true owner of said warrant and decreeing that his title thereto be confirmed.

You refused to recognize said decree as evidence of title under authority of the decision of the Department in the case of Homer Guerrey (35 L. D., 310). The locator was required to perfect his title and was notified that, upon failure to do so, the location would be canceled.

The Department, by decision of March 8, 1909 (not reported), affirmed your decision and held that if Maria E. Spink had title to the warrant at the time of her assignment to Lee, it was acquired as heir of the warrantee and not as donee under the alleged gift from the warrantee.

Prior to the act of March 22, 1852 (10 Stat., 3), military bounty land warrants were not assignable.

The act of September 28, 1850 (section 2436, Revised Statutes), provides that sales, mortgages, or other writings intended to affect the title or claim to any warrant, prior to its issue, shall be null and void, and no warrant shall be subject to any claim or debt incurred by the warrantee prior to the issue of patent. "The purpose of the statute was to secure the bounty to the family of the deceased in all cases where that event should occur antecedent to the actual grant to him of the title." (5 Op. Atty. Gen., 237.) If the warrantee dies without locating the warrant the right to dispose of and locate the same vests in the beneficiaries named in the statute.

The act of March 22, 1852 (section 2414, Revised Statutes), authorizes the assignment of bounty land warrants "by deed or instrument of writing, made and executed according to such form and pursuant to such regulations as may be prescribed by the Commissioner of the General Land Office, so as to vest the assignee with all the rights of the original owner of the warrant."

The act of June 3, 1858 (section 2444, R. S.), provides that when warrants are issued subsequently to the death of the claimant "the title to such warrants shall be vested in the widow, if there be one, and, if there be no widow, then in the heirs or legatees of the claimant."

All legislation granting bounties for military service prior to the act of March 22, 1852, was designed to vest the bounty in the widow or heirs of the soldier in all cases where the warrantee died before the location of the warrant. In authorizing the assignment of the warrant by the warrantee so as to vest in the assignee "all the rights of the original owner of the warrant," and by such assignment to foreclose all right in the widow or heirs to the bounty of the Government, it was competent for Congress to fix the terms and conditions

under which such assignment may be made. It did so by the act of March 22, 1852, declaring that such warrants shall be assignable "by deed or instrument of writing." Any attempted transfer of the title to a warrant, by gift or otherwise, prior to its location, that is not made in compliance with the statute, will not deprive the widow or heirs of the warrantee of the interest and right to such warrant that is secured by the statutes.

In *Johns v. Warren* (85. Iowa, 300; 52 N. W. Rep., 230), it was held that a sale or location of a warrant, made under a power of attorney to locate and to sell, executed in blank for a consideration prior to the act of March 22, 1852, was null and void, and that the title to the land located therewith vested in the heirs of the warrantee.

In view thereof you were directed, in the decision of March 8, 1909, to "require the locator to show that Maria E. Spink was the sole heir of the warrantee at the date of his death, or, if it be shown by corroborated testimony that she is, or was, the daughter of the warrantee and has been in the undisturbed possession of such warrant from 1861 to 1904, it should be considered as a circumstance strongly indicative of the purpose of the heirs to recognize in her all right and title to the same."

Thereafter the locator submitted the affidavits of Mrs. Lucy McFadden and Mrs. W. H. Elder, daughters of Buel H. Fuller, a brother of Maria E. Spink, who stated that on October 4, 1904, their aunt, Maria E. Spink, was visiting them at Lawrence, Kansas, and at that time had in her possession the military bounty land warrant issued to their grandfather, John D. Fuller; that her right to the warrant had never been disputed by affiant, or any of the heirs of John D. Fuller; and that she received it as a gift from her father. They also state that Maria E. Spink sold said warrant to L. E. Lee in their presence, October 4, 1904.

These affidavits corroborate the statement of Maria E. Spink that she is a daughter and heir of John D. Fuller, the warrantee, and that she came into possession of said warrant by a gift from her father. They also show that affiants have waived and relinquished to Maria E. Spink whatever right or interest in said warrant they may have acquired as heirs of John D. Fuller, the warrantee. But they do not fulfill the requirements in the decision of March 8, 1909, to show that Maria E. Spink is the sole heir of the warrantee, or that all the heirs of John D. Fuller have recognized her right to the same.

It is not an unreasonable requirement that the locator should show who are the heirs of John D. Fuller. If he died in the State of New York and his estate was administered upon afterwards, the names of the heirs could readily be ascertained from the records of such proceedings; or, if no administration was had upon said estate,

the names of the heirs could probably be ascertained from the granddaughters whose affidavits have been submitted, and who probably could state whether all of such heirs had knowledge of the claim of Maria E. Spink to the ownership of said warrant. If such affidavits cannot be obtained, the locator should show what reasonable efforts have been made to procure them and why they cannot be procured.

The uninterrupted possession of the warrant for nearly fifty years and the sworn statement of two of the heirs of the warrantee that the right to such possession has always been recognized in Maria E. Spink furnishes strong *prima facie* showing of a right to dispose of the warrant.

The Department is not disposed to be unreasonable in its requirement, but it recognizes that every reasonable precaution should be taken to guard the rights of any unknown claimant, and the proof called for is not unreasonable.

Your decision as thus modified is affirmed.

FINLEY *v.* NESS.

Motion for review of departmental decision of January 18, 1910, 38 L. D., 394, denied by First Assistant Secretary Pierce, March 23, 1910.

MINING CLAIM—DEPOSITS OF ONYX—APPROPRIATION AS LODES.

UTAH ONYX DEVELOPMENT COMPANY.

Valuable deposits of onyx in well-defined fissures in rock in place are subject to appropriation under the lode mining laws.

First Assistant Secretary Pierce to the Commissioner of the General
(E. C. F.) *Land Office, March 24, 1910.* (F. P.)

The Utah Onyx Development Company has appealed from your decision of November 23, 1909, holding for cancellation its mineral entry to the Lea Onyx lode claim, situate in the Salt Lake City land district, in which you hold that said claim is not patentable under the lode mining law.

The record, which is supported upon appeal by a report and statement of James E. Talmage, an eminent geologist and mining expert, shows that the valuable deposit in this claim is onyx, and that the onyx occupies a well-defined fissure with clearly marked hanging and foot walls of limestone, and that the vein of onyx has a well-defined strike and dip. The entire fissure is filled with

onyx of high commercial value. The case is in all essential respects similar to the case of *Webb v. American Asphaltum Mining Company* (157 Fed. Rep., 203), in which the court says that the words "other valuable deposits," in section 2320 of the Revised Statutes, taken in their common signification, include gilsonite and the other solid forms of asphaltum, for these are valuable mineral deposits, and that:

The test which Congress provided by this legislation to be applied to determine how these deposits should be secured was the form and character of the deposits. If they are in veins or lodes in rock in place, they may be located and purchased under this legislation by means of lode mining claims; if they are not in fissures in rock in place but are loose or scattered on or through the land they may be located and bought by the use of placer mining claims.

The Department is disposed to follow this case. Therefore, your decision is reversed, and patent will issue if there are no other objections.

ANDERSON ET AL. *v.* SPENCER ET AL.

Motion for review of departmental decision of December 11, 1909, 38 L. D., 338, denied, and petition for rehearing entertained, by First Assistant Secretary Pierce, March 24, 1910.

NORTHERN PACIFIC GRANT—ADJUSTMENT—CONVEYANCE BY COMPANY—ACT OF JULY 1, 1898.

ESTES *v.* HELM.

Any conveyance by the Northern Pacific Railway Company of lands within the purview of the act of July 1, 1898, after the acceptance of that act by the company, is subject to the right of the individual claimant to assert his right of election to retain the land in conflict.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, March 25, 1910.* (S. W. W.)

The Department has received your office letter of February 9, 1910, requesting instructions as to the disposition of a case pending before your office for adjustment under the provisions of the act of July 1, 1898 (30 Stat., 597, 620), involving lots 5 and 6, Sec. 13, T. 13 N., R. 3 W., Helena, Montana, land district.

It is stated in your said letter that the land described is within the primary limits of the grant made to the Northern Pacific Railroad Company on definite location of July 6, 1882; that the plat of survey was filed in the local land office November 15, 1904, and on the same day the company listed the said tracts under the grant; that on Janu-

ary 14, 1905, Ernest A. Helm presented homestead application for said tracts, alleging settlement and residence since the fall of 1896, and accompanied his application by his election to retain the land under the provisions of the act of July 1, 1898; that the case was included in Montana demand list No. 44, which received departmental approval May 11, 1905, and demand thereunder was made on the company for relinquishment, but the company reported that the land had been sold to George L. Estes, August 21, 1904, and that he had refused the company's request to reconvey the same; that Mr. Helm was informed of that action and authorized to file further election to relinquish the tract and select other land in lieu thereof, which he refused to do.

It is further stated that additional demand was made September 11, 1909, for relinquishment or to show cause why the application of Helm should not be allowed to go of record and patent issue to him upon his making the required proof, to which demand the company replied, under date of December 13, 1909, that earnest and repeated effort had been made to effect a settlement with Mr. Estes in order that the company might comply with the requirement of your office, but that the efforts had been fruitless, and the company was therefore unable to file the relinquishment. No other objection, however, appears to have been made to Helm's claim.

You refer to the departmental instructions of May 6, 1907, not reported, involving certain cases in Washington embraced in demand list No. 71, wherein the company declined to relinquish and the Department held in effect that under the decision of the Supreme Court of the United States in the case of *Humbird v. Avery* (195 U. S., 480) any sale or contract made by the company after its acceptance of the act of 1898, could not interfere with the execution of the provisions of the law, and that the purchasers from the company could occupy no better position than the company from which they had purchased, and that it might be that the Department had authority to issue patents to the individuals notwithstanding the outstanding patents under the railroad grant; but it was further suggested that the issuing of patent where others had previously been issued would, in all probability, transfer to the individual a law suit, and that the United States should, before issuing patents to the individuals, remove the cloud upon the title occasioned by the outstanding railroad patent, and your office was directed to recommend the institution of suit to cancel the outstanding patents to the company. Initiatory steps with that end in view were taken, but the company finally relinquished before the suit was filed.

It is further stated that in the case submitted, however, the land has not been patented to the company and is therefore still within the jurisdiction of the Department.

From the decision of the Supreme Court in the case of *Humbird v. Avery, supra*, it is clear that the railroad company could convey no better title than that which it had, and that its right was subject to the action of the individual whose claim conflicted therewith. The latter having the first right of election, and having elected to retain the land, is entitled to a patent therefor, provided he can show that he has complied with the requirements of the homestead law; and your office will, upon his furnishing satisfactory evidence to that effect, dispose of the case accordingly without regard to the company's refusal to reconvey.

STATE OF FLORIDA.

Motion for review of departmental decision of December 15, 1909, 38 L. D., 350, denied by First Assistant Secretary Pierce, March 28, 1910.

SECOND HOMESTEAD ENTRIES.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 29, 1910.

REGISTERS AND RECEIVERS,
United States Land Offices.

GENTLEMEN: Under date of February 1, 1910, in the case of Marmaduke William Mathews (38 L. D., 406), the Department held that the act of February 8, 1908 (35 Stat., 6), was not a limitation on the equitable power of the land department to grant relief in cases of accident and mistake. Second entries will, therefore, be allowed by this office, although the applicant does not come within the act of February 8, 1908, *supra*, when it satisfactorily appears that obstacles which could not have been foreseen, and which render it impracticable to cultivate the land, are discovered subsequent to entry, or where subsequent to entry and through no fault of the entryman the land becomes useless for agricultural purposes. When an application is presented which can be allowed under any act of Congress, you will allow the same as you are required to do under present regulations. When an application is presented which does not come within the purview of any act of Congress, you will not reject the same, but will make the proper notations on your records, and forward the application to this office, with appropriate recommendation.

Paragraphs 6 and 8 of circular of February 29, 1908 (36 L. D., 291), are accordingly modified.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

R. A. BALLINGER,
Secretary.

CAREY ACT—COAL CLASSIFICATION SUBSEQUENT TO APPROVAL OF
SEGREGATION LIST—ACT OF MARCH 3, 1909.

STATE OF WYOMING.

No complete equitable interest or title vests in a State by the approval of a segregation list under the Carey Act; and if subsequent to such approval and prior to final approval of the patent list, lands in the segregation list are classified as coal, the Department is without authority, so long as such classification stands, to approve or patent such lands to the State, except in accordance with the act of March 3, 1909.

First Assistant Secretary Pierce to the Commissioner of the General
(O. L.) *Land Office, March 29, 1910.* (E. B. C.)

The State of Wyoming, through its Commissioner of Public Lands, has appealed from your office decision of July 26, 1909, declining to certify to the Department, for approval and subsequent patenting, list for patent No. 17, filed July 11, 1907, and embracing certain specified tracts aggregating 7920.09 acres, situated in townships 43 N., ranges 78, 79 and 80 W., and T. 44 N., R. 78 W., Buffalo, Wyoming, land district. This list was filed pursuant to the provisions of section 4 of the act of August 18, 1894 (28 Stat., 372, 422), commonly known as the "Carey Act," and acts amendatory thereof, the tracts having been theretofore embraced in segregation list No. 33. The refusal of your office is based upon the ground that the tracts in T. 43 N., Rs. 78 and 79 W., were classified July 22, 1909, as coal lands upon the records of your office, and consequently were not patentable to the State unless it should elect to take a patent reserving the coal under the act of March 3, 1909 (35 Stat., 844), and that the lands in T. 44 N., R. 78 W., were withdrawn from entry or other disposition by departmental order of April 2, 1909, for examination and classification, thus leaving only 280 acres situated in section 13, T. 43 N., R. 80 W., subject to certification and patent at the present time. Your office granted the State an opportunity to elect to take the surface pursuant to the act of March 3, 1909, *supra*, or to apply for a hearing to ascertain and determine the character of the lands, or to appeal.

The lands involved were segregated under list No. 33, filed and approved in 1905. Under date of October 11, 1905, the contract con-

templated by the statute between the United States and the State was executed by the then Secretary of the Interior and the Governor of Wyoming, and was approved by the President; officials of your office having certified that the tracts were shown by the records to be vacant and unappropriated, not returned as mineral, and not in townships containing mining claims of record in your office. This contract is upon the prescribed form; and it is therein, among other things, provided that the Secretary of the Interior contracts and agrees and—

hereby binds the United States of America to donate, grant and patent to said State, or to its assigns, free from cost for survey or price, any particular tract or tracts of said land, whenever an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim the same, in accordance with the provisions of said acts of Congress and with the regulations issued thereunder, and with the terms of this contract, at any time within ten years from date of the approval of said map of the lands.

* * * * *

It is distinctly understood and fully agreed that all persons acquiring rights to said lands from said State prior to the issuance of patent, as hereinafter mentioned, will take the same subject to all the requirements of said acts of Congress and to the terms of this contract, and shall show full compliance therewith before they shall have any claim against the United States for a patent to said lands.

* * * * *

It is further understood and agreed that as soon as an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of said lands, the said State, or its assigns, may make proof thereunder, and according to such rules and regulations as may be prescribed therefor by the Secretary of the Interior, and as soon as such proof shall have been examined and found to be satisfactory patents shall issue to said State, or to its assigns, for the tract included in said proof.

From the foregoing, it is clearly perceived that the terms of the statute and the provisions of such regulations as the Secretary may promulgate thereunder are incorporated into the contract. The Carey Act provides that the lands which are to be the subject-matter of any grant or patent thereunder are those "desert lands as defined by the act" of March 3, 1877 (19 Stat., 377), and the amendatory act of March 3, 1891 (26 Stat., 1095), which provide for the sale of desert lands to individual entrymen. Section 2 of the former act provides that desert lands shall be those exclusive of timber lands and mineral lands.

The circular of January 15, 1902 (31 L. D., 228), which was in force when the segregation list here involved was presented, among other things provides:

5. The map should indicate clearly the tracts selected, which must all be desert lands as defined by the acts of 1877 and 1891, and the decisions and regu-

lations of your office therein provided for. The language of the former act, and the decisions thereunder, are as follows:

"All lands exclusive of timber lands and mineral lands, which will not, without artificial irrigation produce some agricultural crop shall be deemed desert lands."

* * * * *

18. Thereupon, the register and receiver shall forward the list for patent to the General Land Office, noting thereon any protests or contests on any of the following grounds: Failure to comply with the law, the nondesert character of the land, prior adverse rights, or the mineral character of the land, transmitting any papers filed, and submitting any recommendations they may deem proper.

The form of notice to be published and posted when the list for patent is presented to the local office is prescribed by paragraph 17 of the circular. The notice given in the present case, bearing date June 11, 1907, follows the prescribed form and recites:

Within the next sixty days following the date of this notice, protests or contests against the claim of the State to any tract described in the list, on the ground of failure to comply with the law, on the ground of the nondesert character of the land, on the ground of a prior adverse right, or on the ground that the same is more valuable for mining than for agricultural purposes, will be received and noted for report to the General Land Office at Washington, D. C.

The State, in substance, contends that the approval by the Department of the segregation list definitely determines the nonmineral character of the land; that to give effect to the coal withdrawal and classification would abridge and invalidate the terms of the solemn contract entered into between the United States and the State of Wyoming; and that the State, having submitted its proofs as to reclamation prior to the classification, is within the last proviso of the act of March 3, 1909, *supra*, which states:

Such locator, selector, or entryman who has heretofore made or shall hereafter make final proof showing good faith and satisfactory compliance with the law under which his land is claimed shall be entitled to a patent without reservation, unless at the time of such final proof and entry it shall be shown that the land is chiefly valuable for coal.

As shown above, both the Carey Act and the regulations thereunder clearly contemplate that the land which is subject to listing for patent and for which patent is to issue to the State must be, in fact, nonmineral in character, and the acquirement of minerals by the State is expressly inhibited. This is even more forcibly disclosed in the present regulations of the Department, promulgated April 9, 1909 (37 L. D., 624, *et seq.*), which, in part, state:

2. . . . Lands occupied by *bona fide* settlers and lands containing valuable deposits of coal or other minerals are not subject to selection. . . .

12 Lands upon which valuable deposits of coal or other minerals are discovered will not be patented to the State under these acts.

In the present form of contract the following definite stipulation upon this subject is found:

Neither the approval of said application, map, and plan, nor the segregation of said land by the Secretary of the Interior, nor anything in this contract, or in said acts of Congress, shall be so construed as to give said State any interest whatever in any lands upon which, at the date of the filing of the map and plan hereinbefore referred to, there may be an actual settlement by a *bona fide* settler, qualified under the public-land laws to acquire title thereto, or which are known to be valuable for their deposits of coal or other minerals.

Current regulations are cited not for the purpose of applying their terms retroactively to the present case, but for the purpose of showing the interpretation of the statute heretofore officially announced by the Department.

The Department is not favorably impressed with the contention that the approval of the segregation list operates to preclude investigation and determination of the character of the land, whether mineral or nonmineral, as of a date subsequent thereto.

Although, as stated in the instructions (37 L. D., 489), the proper time to ascertain the character of the lands applied for by the State as to whether they are desert and nonmineral is at the time of segregation, yet those instructions are an admonition to all concerned that only those lands within the grant should be segregated. By reason of such segregation the State obtains no vested right or interest in the land. The segregation while subsisting operates merely as a withdrawal or reservation of the tracts for the purposes of the act, subsequent conditions wholly determining whether the State shall obtain title in any event. The approval of the segregation list does not fix the status of the land as conclusively nonmineral. The Government's title remains unaffected until the "State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior," showing compliance with law, as is set forth in the act. Until such proofs are examined and found to be, and are accepted as, sufficient it can not be said that they are "satisfactory," and such sufficiency is not finally determined and announced until the Secretary of the Interior has affixed his approval to the patent list. It must, therefore, be held that no complete equitable interest or title to the land becomes vested in the State until the final approval of the patent list, as is the case of many analogous instances, as that of forest lieu selections, *Miller v. Thompson* (36 L. D., 492); *Thomas B. Walker* (36 L. D., 495); railroad land grants and indemnity selections, *Barden v. Northern Pacific Railroad Co.* (154 U. S., 288); *Wisconsin Central Railroad Co. v. Price County* (133 U. S., 496); and State school indemnity selections and selections for public improvements, *State of California* (37 L. D., 499); Regulations (35 L. D., 537, paragraph 11).

It may be suggested that after the land is segregated the State is authorized by the act of June 11, 1896 (29 Stat., 434), to create a lien, which shall be valid against the separate legal subdivisions of the land reclaimed, with the proviso that in no event shall the United States be in any manner liable for any amount of such lien. The following language from the case of *Barden v. Northern Pacific Railroad Co.*, *supra*, page 324, used in reference to the authority granted by Congress to the company to mortgage its entire property, completely answers such a contention, and is as follows:

Congress thereby only authorized a mortgage upon the property granted to the company, which was the lands without minerals. The mortgage could not cover more than the property granted.

So here, mineral lands not being within the purview of the grant under the Carey Act, the State can create no lien against the same.

From the foregoing it necessarily follows that the State is not vested with such interest as will enable it to take any advantage of the proviso contained in the act of March 3, 1909, *supra*.

In this connection it may be observed that under the desert-land acts, no matter how extensive may have been the entryman's improvements and reclamation, a disclosure of mineral prior to final entry will defeat the claimant; and it is to those acts that the Carey Act expressly refers for the definition of desert lands.

The character of the tracts for which patent is sought, whether mineral or otherwise, is an open question subject to investigation and adjudication up to the time of the final departmental approval of the patent list, which thereupon becomes the basis for the issuance of patent to the State.

The land department has no authority under the law to approve or patent to the State, or its assigns, any known valuable deposits of coal or other minerals. If the lands sought by the State are actually coal lands, in the absence of the remedial legislation contained in the act of March 3, 1909, *supra*, the only action which could be taken would be to cancel outright the listed tracts; but that act saves to the claimant under the nonmineral laws who has initiated his claim in good faith the right to obtain patent to the surface, even if it be shown that the land contains valuable deposits of coal.

The further contention urged on behalf of the State is that the contract above mentioned binds the Government to issue patent when proper evidence of reclamation and compliance with law is presented and found satisfactory, and this notwithstanding any order of withdrawal, or of classification as coal lands promulgated by the Department, and that it is beyond the power of Congress to abridge or invalidate the terms of this contract, and much more without the authority of the Interior Department to rescind or nullify said agreement entered into under the express terms of the statute.

As has been above shown, under the statute and regulations, which are in effect incorporated among the provisions of said agreement, only desert lands, exclusive of mineral lands, are within the purview of the grant contemplated by the Carey Act. It is not a question of abrogating the contract or nullifying the law, but of complying with and carrying out the terms of both.

The records of your office show that most of the lands in townships 43 north, ranges 78 and 79 west were classified as coal lands at the minimum price. The Commissioner of Public Lands for the State avers—

that it is verily believed that the lands in the said list number 17 are more valuable for agricultural purposes than for coal.

Before the State is called upon to elect to take patent with a reservation, or to proceed to hearing, it is deemed advisable in the present case to direct that your office submit this list and accompanying papers, including the report of December 10, 1908, from the coal land examiner of your office, to the Geological Survey for consideration with a view to a speedy classification of the lands in the withdrawn township 44 north, range 78 west, and a possible reclassification of the other two townships. See Instructions (38 L. D., 271). If coal classification be made and adhered to, the State will then be called upon to elect to accept patent with a reservation of the coal deposits, or to proceed to a hearing to ascertain and adjudicate the character of the land, at which the burden of sustaining the coal classification will rest upon the Government. If upon such hearing the tracts are determined to be coal lands, the State may still take a patent for the surface, and if noncoal, patent without a reservation may issue, all else being regular.

The decision of your office is accordingly modified to conform to the foregoing.

**APPROXIMATION—APPLIED TO RECLAMATION HOMESTEADS AND
DESERT ENTRIES WITHIN RECLAMATION PROJECTS.**

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., March 30, 1910.

THE HONORABLE THE SECRETARY OF THE INTERIOR.

SIR: Section 3 of the act of June 17, 1902 (32 Stat., 388), provides for the entry of lands included in a second form reclamation withdrawal in tracts of not less than forty nor "more than one hundred and sixty acres."

Section 5 of the act of June 27, 1906 (34 Stat., 520), bestows upon desert-land entrymen, under certain conditions, the benefits of the act of June 17, 1902, it being provided, among other things, that the

said entrymen shall relinquish all of the land embraced in their desert land entries "in excess of one hundred and sixty acres."

The question arises as to whether or not, by applying the rule of approximation, we may allow reclamation homestead entries in excess of the maximum area of one hundred and sixty acres provided by law, and, similarly, as to whether or not we may allow desert land entrymen coming under the provisions of the reclamation act to retain in their entries lands in excess of one hundred and sixty acres.

Under the instructions of February 10, 1902 (31 L. D., 225), as to exchange of lands under the act of June 4, 1897 (30 Stat., 36), which provides that one holding land in a forest reservation may relinquish the tract to the government and select in lieu thereof a tract of vacant land open to settlement, "not exceeding in area the tract covered by his claim or patent," it is held that the rule of approximation may be applied. In said instructions it is held that—

The words "not exceeding in area the tract covered by his claim or patent" are not more restrictive than similar words of limitation of quantity in many other land laws, as in section 2279 (Revised Statutes): "No person shall have the right of preemption to more than one hundred and sixty acres;" (R. S. 2289) "which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres;" (R. S. 2306) "so much land as when added to the quantity previously entered shall not exceed one hundred and sixty acres;" (25 Stat., 854) "which shall not with the land first entered and occupied exceed in the aggregate one hundred and sixty acres;" (R. S. 2283) "not exceeding one hundred and sixty acres;" (26 Stat., 496) "not exceeding three hundred and twenty acres;" (20 Stat., 113) "not more than one quarter of any section shall be so patented."

Such words of limitation are as explicit, restrictive, and little susceptible of construction as are those in the act of 1897. Yet entries made under these statutes, under a long established practice of the land department, are permitted to include an excess above the area limited by the statutes. J. B. Burns (7 L. D., 20, 23); *Whitcher v. Southern Pacific Railroad Company* (3 L. D., 459); *Richard Dotson* (13 L. D., 275); *Abram A. Still* (13 L. D., 610); *James Hampton* (15 L. D., 449); *Charles W. Miller* (6 L. D., 339).

From an extended examination of the cases wherein the rule of approximation has been applied, it appears that in no instance was the rule founded upon statutory authority. The rule of approximation arose from no difficulty in construing the words of limitation, but because a literal execution of the statute was impracticable without frequent denial to entrymen of part of their entry right.

In view of the authorities cited, this office is of the opinion that the rule of approximation should be applied to reclamation homestead entries and to desert entries coming within the provisions of the reclamation act.

Very respectfully,

S. V. PROUDFIT,
Assistant Commissioner.

Approved March 30, 1910:

R. A. BALLINGER,
Secretary of the Interior.

~~INSANE ENTRYMAN—RESIDENCE—ACT OF JUNE 8, 1880.~~WELSH *v.* HACKETT.

The homestead entry of one who became insane before expiration of six months from entry, without having established residence, is not protected by the act of June 8, 1880.

First Assistant Secretary Pierce to the Commissioner of the General
(O. L.) *Land Office, March 30, 1910.* (J. R. W.)

John S. Hackett, insane, by his guardian Fred L. Hackett, appealed from your decision of November 19, 1909, denying his petition, filed October 15, 1909, to set aside proceedings under contest of Benjamin F. Welsh against John S. Hackett's homestead entry for NE. $\frac{1}{4}$, Sec. 25, T. 3 N., R. 13 E., Rapid City, South Dakota.

November 21, 1906, John S. Hackett made homestead entry for the land, against which, October 22, 1907, Welsh filed contest affidavit alleging claimant had never established nor maintained residence. Hearing was had February 17, 1908, at which Welsh submitted testimony, but Hackett failed to appear. Service had been by publication. The local office held the entry for cancellation, which you affirmed, and September 22, 1909, the entry was canceled and case closed. October 15, 1909, Fred L. Hackett filed in the local office an affidavit that John S. Hackett made entry with intent to comply with the homestead law, but, after three months, became insane and wandered from home, and no trace of him could be found until about January 1, 1909, when he was located in the State Hospital for Insane, at Rochester, Minnesota; since January 1, 1907, the entryman has been so mentally deranged as to be incompetent to attend to his affairs, relating to his homestead or otherwise, and affiant is informed by the superintendent of the hospital that claimant's disability is permanent.

Upon this affidavit it is asked that proceedings on the contest be set aside, and affiant, who is a guardian duly appointed, be admitted to defend the contest. You denied the petition because it was shown by the evidence in the contest that the entryman never resided upon, cultivated or improved the land. The appeal contends that the act of June 8, 1880 (21 Stat., 166), entitled the entryman to patent. The act provides:

In all cases in which parties who regularly initiated claims to public lands as settlers thereon according to provisions of the preemption or homestead laws, have become insane or shall thereafter become insane before the expiration of the time during which their residence, cultivation, or improvement of the land claimed by them is required by law to be continued in order to enable them to make the proper proof and perfect their claims, it shall be lawful for the required proof and payment to be made for their benefit by any person who may be legally authorized to act for them during their disability, and thereupon

their claims shall be confirmed and patented, provided it shall be shown by proof satisfactory to the Commissioner of the General Land Office that the parties complied in good faith with the legal requirements up to the time of their becoming insane.

This act is for relief of "settlers." It provides for relief of persons who become insane during the period of their "residence." A settler is one who attaches himself to a piece of public land by such unequivocal act as shows his intent to make his home there and to acquire title under the settlement laws. A resident is one who in compliance with the settlement laws is residing upon public lands. Until such acts have been performed as show unequivocally that an entryman intended to make his home on the land, he is neither a settler nor a resident. Under the homestead law one may make his settlement before entry, or not until afterwards. For six months after his entry the practice of the land department is to protect his entry against a charge of abandonment—not because he is in any sense a settler, but because he has unequivocally declared his intention to become a settler. The land is held that length of time against a charge of abandonment. The application here fails to show that the entryman ever established residence or became a settler. This case differs from that of *Ostreim v. Byhre* (37 L. D., 212) only in the fact that alleged insanity in this case occurred within six months from date of entry, whereas in that case insanity occurred after lapse of the six months period. This, in view of the Department, makes no difference. The essential fact is that without having established residence, the entryman is alleged to have become insane. The present case is within the reason of the decision cited. The entryman is not within the provision of the statute.

The affidavit for leave to open the case and defend is itself a negative pregnant. It states "that John S. Hackett, entryman aforesaid, insane, entered the land in good faith, intending to provide for himself a home upon the government domain and comply with the homestead law." This implies that Hackett was insane at the time of his entry, which would, of course, make the entry void, for he was incompetent to make it. The affidavit then proceeds to say that shortly after making the entry, about three months, the said John S. Hackett, insane, suffering from his weakness of mind, wandered away and his relatives lost all trace of him until about January 1, 1909, when he was found an inmate of the Insane Hospital, Rochester, Minnesota, and at time of contest and hearing he was unable to care for his business, but had a valid defense and had complied with the law to the time of becoming insane.

There is no distinct allegation that he was sane when he made the entry, or when he became insane, or that he complied with the law up to the time he became insane, or that he had ever established residence on his land.

Nothing in this decision will be considered a bar to a proper and definite affidavit that the entry was made by Hackett when sane, with the intent to make it his home; that he established residence on the land and afterwards became insane. Should such an affidavit be filed, it will be considered. All that is here decided is that the affidavit herein filed does not justify the ordering of a hearing.

Your decision is affirmed.

**SOLDIERS' ADDITIONAL—REISSUE AND RECERTIFICATION
DISCONTINUED.**

INSTRUCTIONS.

The practice of recertifying soldiers' additional rights, and issuing substitutes for lost or destroyed soldiers' additional certificates, discontinued, and the circular of October 16, 1894, in so far as it relates to certification, withdrawn and vacated.

Secretary Ballinger to the Commissioner of the General Land Office,
(O. L.) *April 1, 1910.* (C. E. W.)

Hereafter the practice of recertifying "soldiers' additional homestead rights" and of issuing substitutes for lost or destroyed "soldiers' additional homestead" certificates will cease, and the circular of October 16, 1894 (19 L. D., 302), so far as it relates to certification, is hereby withdrawn and vacated.

There is no law requiring, or even authorizing, these certificates; nor is there any law in the administration of which they are essential or, in the present view, even desirable. They have bred confusion and misunderstanding as to their character and purpose, and have proven oftentimes to be instruments for the miscarriage of the purpose of the very statutes whose administration they were innocently designed to facilitate. As articles of commerce, their value has been misunderstood and the practice has fostered an idea that recertification, as it is commonly called, is necessary for the enjoyment of an unused soldiers' additional right by a *bona fide* assignee; whereas, it is in nowise thus essential. Recertifying creates no rights; the practice, carefully confined, rarely affords evidence of such rights. Where the right really exists, there is no need of certifying or recertifying; where the right does not in law or fact exist, it goes without saying that there should be no certifying.

The act of August 18, 1894 (28 Stat., 372, 397), operates on *existing certificates*, theretofore issued, in the hands of *bona fide* purchasers for value. It in no way affects the basic right, or alleged right, for which no "certificate" had been issued, or, if issued, had been lost or destroyed prior to transfer for value.

The practice of recertifying, or of reissuing lost or destroyed certificates, has created, in some quarters, a misapprehension of the operation of this act and has led some to assume that there is such a thing as a ministerial duty laid on the Department to recertify in any and all circumstances, when demand is made and proof is afforded of the loss or destruction of an original certificate, even where that certificate was inadvertently, improvidently, or unlawfully issued; even where the applicant, in the first instance, lacked the statutory qualifications for the "additional right" which the certificate, *prima facie*, evinced. The Department has endeavored never to recertify a right when the absence of some of its basic elements is brought to its attention. But occasionally there has been recertification under circumstances not justifying that indulgence, and, in fact, effecting a situation in derogation of the provisions of the homestead laws. While such cases form exceptional incidents, yet these incidents may, and have been, turned to the Government's disadvantage.

So it is deemed advisable hereafter, in all cases, not to exceed the plain statutory requirements in administering Revised Statutes, section 2306, and the act of August 18, 1894; and these requirements certainly do not include anything in the way of certification.

**STATE SELECTION—SCHOOL INDEMNITY—RELINQUISHMENT OF
HOMESTEAD ENTRY.**

TODD v. STATE OF WASHINGTON (ON REVIEW).

The State by failing to file motion for review within the time allowed therefor having acquiesced in the action of the Department rejecting its proffered school indemnity selection for conflict with a homestead entry allowed upon settlement prior to survey, and the preference right period accorded by the act of March 3, 1893, within which to make such selections having expired, it has thereafter no such claim or right by reason of its attempted selection as will prevent other appropriation of the land upon relinquishment of the conflicting homestead entry.

Departmental decision of August 26, 1909, 38 L. D., 165, vacated.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, April 1, 1910.* (G. B. G.)

This is a duly entertained and matured motion on behalf of Edward H. Todd for review of departmental decision of August 26, 1909 (38 L. D., 165), which affirmed your office decisions of June 26, 1908, and April 27, 1909, holding that the State of Washington should be allowed to select, as indemnity school land, the SE. $\frac{1}{4}$ of Sec. 34, T. 25 N., R. 12 W., Seattle land district, Washington.

The plat of survey of the township in question was filed in the district land office July 13, 1905. September 9, 1905, which was

within the preference right period accorded the State of Washington by the act of March 3, 1893 (27 Stat., 593), for the selection of indemnity school lands; the State filed its list No. 23, which embraced nearly all the land in this township, including the tract here involved; but previous to the filing of the State's list, a number of homestead applications had been filed by persons who alleged settlement prior to survey, among which was that of one Joseph T. Barkley, who was allowed to make homestead entry for this tract August 8, 1905.

Barkley's case, and a number of others similarly situated, was involved in the case of Homestead and Timber Land Claimants *v.* State of Washington, decided by this Department September 20, 1907 (36 L. D., 89), in which it was held that the claim of Barkley was superior to that of the State. This decision was promulgated by your office October 11, 1907.

February 14, 1908, Barkley relinquished his entry, and on March 19, following, said Edward H. Todd filed timber and stone application for the tract, and submitted proof thereon June 10, 1908, on which date cash receipt issued, but final certificate was withheld by the register, and final proof suspended, because of conflict with the State's selection. Accordingly, when your office, on June 26, 1908, returned the State's list for allowance as to certain tracts to which its claim had been found superior, it was at the same time held that the State would be permitted to perfect its application to the tracts so relinquished by Barkley, upon the payment of fees, and the State's application was accordingly allowed October 12, 1908.

Upon this state of facts the Department, in the decision under review, ruled the State's claim superior to that of Todd, and held (syllabus):

Where a settlement claim antedating a selection by the State of Washington under the act of March 3, 1893, and held in departmental decision of September 20, 1907 (36 L. D., 89), to be superior to the claim of the State, was subsequently relinquished while the State's claim under its selection was still subsisting and pending before the land department, the right of the State under its selection immediately attached.

The purpose of the proviso to the act of 1893 was to protect *bona fide* settlers, and it was not intended to provide a means whereby a settlement claim might be presented merely to defeat the right of the State to select, and afterwards relinquished and entry for the same land made under the timber and stone law.

Upon further consideration of this case under the particular facts and circumstances stated, it is now believed that the conclusion therein reached was erroneous.

It is urged in support of the motion that the statement in the decision under review that the State's relinquishment of other tracts similarly situated was "presumably in acquiescence" with said departmental decision of September 20, 1907, was erroneous; that

examination of the record of that decision shows that the relinquishments in question were filed prior thereto, hence could not have been in acquiescence thereof or induced thereby, and that therefore a deduction drawn from those circumstances, that the State had good and sufficient reason for not relinquishing this tract, and was still asserting claim thereto, was not well founded.

The question of fact involved in this contention is not controlling, and the record thereon need not be restated. It is immaterial what may have been the State's reason for failing to finally relinquish its claim to this tract. The State's claim thereto was disposed of on page 92 of said decision of September 20, 1907, as follows:

About the time the State's appeal was filed there was also filed what purports to be an order approved by the Board of State Land Commissioners, for the relinquishment of all claim under its selection as to the land embraced in but six (being but a very small part) of the entries in question, the order being described as based upon the report of certain named State land inspectors respecting the character of settlement and improvements made and maintained upon these lands. The nature of said report respecting any of the other homestead entries in question, if such were made, is not with the papers nor does it accompany the relinquishment, and no other showing has been filed on behalf of the State in anywise questioning the *bona fides* of any of the homestead claims involved.

When it is remembered that these lands were surveyed in the summer and fall of 1903, after which time they were capable of identification in the field; that the official plats were not filed until July, 1905; that the lands were undoubtedly cruised and examined by the agents of the State before the lists of selection were filed, or should have been so examined if objection was intended to be made to any of the claims being asserted thereto by reason of settlement or occupancy; and that the State is chargeable with notice of the circular of 1893, no good reason appears why further time should be accorded the State to object to the sufficiency, in any particular, of these homestead claims, and your office decision, in so far as it respected and approved of the allowance of said homestead claims, is hereby accordingly affirmed and the selections to that extent rejected.

The State did not file a motion for review of that decision, and the time accorded by the Rules of Practice for the filing of such motion had expired before Todd had made entry of the land. Inasmuch as the State's selection of the tract had never been accepted, therefore, at the date this entry was allowed it was unappropriated government land, and subject to appropriation under the public land laws. It is questionable if the State's claim could properly be sustained even if its selection had been accepted by the local officers; but, however this may be, clearly, such claim as the State had, not being diligently asserted, was no bar to the allowance of this entry. It is true, as held by the Department, that the purpose of the proviso to the act of 1893 was not intended to provide a means whereby a settlement claim might be presented merely to defeat the right of the State to select the land; but this case does not present that ques-

tion. The *bona fides* of the Barkley entry is nowhere questioned in this record. The Department has held that his was a valid claim, and such an one as admittedly defeated the claim of the State and barred the State's exercise of a preference right to select said tract. This was true during the whole of the preference right period in relation to said township. It can not, therefore, be well said that after the expiration of the preference right period, after the State's claim had been adversely adjudicated, and after it had acquiesced in said decision by failing to file its motion for review, it still has such claim to the land as will prevent its appropriation by other persons under other laws.

The decision under review is therefore hereby vacated, and Todd will be allowed to complete his entry, and, in the absence of other objection, he will be entitled to the issuance of final certificate and patent upon said entry.

APPLICATION SUBJECT TO PREFERENCE RIGHT—DEATH OF APPLICANT—RIGHTS OF HEIRS.

TURNER *v.* WILCOX HEIRS.

In case of the death of an applicant whose application was received during the thirty-day preferred period accorded a successful contestant and held subject to contestant's right, his heirs, upon expiration of the preferred period without action by contestant, are entitled to complete the right initiated by the application and perfect entry thereunder in accordance with section 2291, R. S.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, April 2, 1910.* (E. F. B.)

The land in controversy is lots 1 and 2 and the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 30, T. 105 N., R. 79 W., Chamberlain, South Dakota. It was formerly embraced in the homestead entry of Walter Tyson, which was canceled January 23, 1908, upon the contest of Albert H. Blinco. Contestant was notified of said decision by registered mail January 27, 1908.

January 30, 1908, during the period allowed by statute to the contestant to exercise a preference right of entry, Isaiah Wilcox filed with the local office an application to make homestead entry of said tracts, which was received, entered and held in abeyance pending the period of Blinco's preference right in accordance with the instructions of July 14, 1899 (29 L. D., 29). Notice was sent to Wilcox that Blinco's preference right had expired and no application had been made by him to make entry of the land; that he (Wilcox) could deposit the necessary fees and commissions to complete his application. In response to that notice, Ray Gooder, as agent of the heirs

of Wilcox, March 17, 1908, filed the application of O. A. Whan, nephew of said Wilcox, stating that Wilcox was a settler upon the land covered by his application; that he died February 28, 1908, while a settler upon said land; that his heirs are Almond Wilcox, Nathan Wilcox, Mrs. Hattie Wilson, Mrs. Cora Bellenger, Mrs. Ellen Bunday and Mrs. J. Moody. He requested to be advised as to what procedure he should take in the case and that the time be set for the heirs to act.

Applicant was advised by the local officers that Wilcox, by his application and settlement, had initiated such claim to the tract as would entitle the heirs to make entry thereof, but their attention was called to the case of *Becker v. Bjerke* (36 L. D., 26), indicating that should the heirs perfect the application to make entry, "they would doubtless be required to perfect the entry by actual residence upon the land the same as the original claimant himself should have been required to do had he made entry of the tract."

May 9, 1908, the said O. A. Whan appeared at the local office, tendered fees and commissions and demanded that the original application, filed by Wilcox, be placed of record. At the same time, he stated "that the heirs did not wish to perfect the application and make entry for the tract as they were none of them willing to reside upon the entry."

In passing upon that application, the local officers held that, as Wilcox died prior to the expiration of Blinco's preference right and therefore before his application could receive any consideration whatever, there was no authority to place it of record. It was also stated by them that more than ninety days had elapsed since the alleged settlement of Wilcox had become effective and no attempt had been made by any of the heirs to assert any claim to the tract, and that an intervening application had been filed by LeRoy Simmon to make entry of the land, which was suspended pending the disposition of Whan's application. The application was therefore rejected, and from that decision an appeal was filed by Ray Gooder, as agent for the heirs of Wilcox.

Upon the receipt of that appeal your office, by letter of October 17, 1908, called for further information as to the residence and improvement made by Wilcox before his death. In response thereto, an affidavit was furnished, executed by N. L. Wilcox, a son and one of the heirs at law of said Isaiah Wilcox, who stated that on or about the 1st of September, 1907, the said Isaiah Wilcox built a frame house upon said land, 10 x 12 feet, which was furnished, and that Wilcox established a residence therein about September 10, 1907, continuing to reside in and occupy the same until the date of his death, February 28, 1908, except during the last four or five days of his life when he stayed at the home of Otis A. Whan to be cared for, he having

received an injury which caused his death; that said house and contents were destroyed by fire on or about July 16, 1908, and the house was rebuilt on said land about July 20, 1908, by Otis A. Whan for and in the interest of said heirs; that a lot four or five rods square was inclosed with a substantial wire fence, and that the hay on said land was cut during the season of 1908 by a trespasser against the right of said heirs. The affidavit was corroborated by Otis A. Whan.

February 27, 1909, while the application was pending before your office, Virgil O. Turner filed a corroborated affidavit claiming that, since October 8, 1908, he and his wife and children have resided on said land and were then residing thereon; that Isaiah Wilcox was not a resident on said land at the time of his death, nor for some time prior thereto; that none of the heirs has resided, or intended to reside, upon the claim, but are attempting to hold the same for speculation and have offered it for sale.

You reversed the decision of the local officers and held that the heirs of Wilcox should have been permitted to perfect said claim, under the rule announced in *Townsend's Heirs v. Spellman* (2 L. D., 77), that "where an application is made by a party to enter land and the party dies before the entry is perfected his heirs may make the desired entry."

The principle upon which the doctrine announced in *Townsend's Heirs v. Spellman* rests is that where a person qualified to make entry has *initiated* a claim to a tract of land, under the settlement laws, either by settlement or by application to enter, and dies before perfecting or completing the application, the right to complete the same inures to his heirs, who may file all the necessary papers to perfect it to the same extent that the applicant could have done had he lived.

Specific provision was made in the preemption act (section 2269 R. S.) for the completion of claims initiated under that act, where the settler dies before consummating his claim, by filing in due time all the papers essential to the establishment of the same by allowing his heirs or legal representatives to file the necessary papers. That act has been construed in *pari materia* with the act of May 14, 1880, and has been applied to settlement rights initiated under said last mentioned act, which enlarged and extended the rights and privileges of persons who seek to acquire title under the homestead law, by providing that rights under said law may be initiated by settlement, whether upon surveyed or unsurveyed lands, and that such settler may be allowed the same time to file his claim as is now allowed to settlers under the preemption laws to put their claims of record, and his rights shall relate back to the date of settlement the same as if he had settled under the preemption laws. *Townsend's Heirs v. Spellman*, *supra*; *Winters v. Jordan* (2 L. D., 85); *Tobias Beckner*

(6 L. D., 134); Prestina B. Howard (8 L. D., 286); Bellamy v. Cox (24 L. D., 181); Instructions (35 L. D., 573).

Wilcox acquired no right to the land, either by his settlement or application, that he could bequeath to his devisee, or that would have descended to his heirs. He had only a right to make entry of the land, and by completing his application and fulfilling the requirements of the law, acquire title to it. That is the right the statute confers upon his heirs, and that only.

The order of succession is fixed by the statute; first to the widow and, in case of her death, to his heirs and devisees. The question as to who are the heirs or devisees of a claimant of public lands must be determined by the laws of the State. But they succeed to the right by virtue of the statute and take as original beneficiaries, not by descent from him. While they succeed to the right that the applicant had initiated while in life, the title to be acquired is not derivative but original. *Hutchinson Investment Co. v. Caldwell* (152 U. S., 65); *McCune v. Essig* (199 U. S., 382).

In determining whether there is any right to which the heirs or devisees will succeed and may perfect under the statute, the material question is, had the settler or applicant initiated such right at the time of his death as he could have perfected. If so, the statute confers upon the beneficiaries named therein, in the order of succession, all the right the settler or applicant may have initiated or acquired at the time of his death which he could have perfected had he lived.

No vested right is acquired by a mere application to enter. It merely initiates an inchoate right which does not inure to the heirs or devisees of the applicant unless it is so provided by statute. *Burns v. Bergh's Heirs* (37 L. D., 161).

Erroneous views have been entertained as to the scope of the decision of the Department in the case of Tobias Beckner, *supra*. It was not held in that case that a homestead right or entry unperfected was inheritable and devisable, or that Beckner acquired any estate under the will of Holbrook. It merely held that a settler upon unsurveyed public land, who died prior to survey, left such right as could have been perfected by his heirs or devisees and that the devisee named in his will succeeded to the right given by the statute to perfect and complete the right initiated by said applicant. That ruling is strictly in accord with the rulings of the Department and the decisions of the Supreme Court above cited.

A legal application to enter is equivalent to an actual entry so far as applicant's rights are concerned. *Pfeff v. Williams* (4 L. D., 455). Upon this principle, it has been held that the heirs of an applicant who dies before his application has been perfected may perfect such application and complete the entry by fulfilling the requirements of

the statute. *Townsend's Heirs v. Spellman*, *supra*; *Prestina B. Howard* (8 L. D., 286); *Rosenberg v. Hale's Heirs* (9 L. D., 161); *Thompson v. Ogden* (14 L. D., 65); *Northern Pacific R. R. Co. v. Coffman et al.* (24 L. D., 280); *Heirs of Philip Mulnix* (33 L. D., 331). The decisive question is whether it was such application as initiated a right to the land.

The local officers rejected the application of the heirs for the reason that Wilcox died before his application could have been allowed and placed of record. The initiation of Wilcox's right did not depend upon the placing of his application of record. It was a legal application allowed and provided for under the rule announced in *Stewart v. Peterson* (28 L. D., 515). The instructions issued in conformity with that ruling declared that no application should be received nor any right recognized as initiated by the tender of an application for the land embraced in an entry of record. But it also provided that, after an entry has been canceled upon the records of the local office, applications to enter "may be *received, entered* and held subject to the preferred right of the contestant" for the statutory period. The rule expressly recognizes that the land is subject to entry after the cancellation of the former entry has been made of record, and that a legal application may be made for such land which will be held subject to the preferred right of the contestant. The purpose of the rule in withholding such applications from record is to avoid encumbering the records with claims that might be defeated by the exercise of the preference right. But as the claim was initiated by the filing of a legal application, the right to complete it vested *ipso facto* by lapse of time, whether it was in the applicant or his heirs or devisees.

The heirs of Wilcox sought to perfect the right of entry in due time, whether such right is predicated upon the application or is claimed in virtue of settlement. Tyson's entry was canceled upon the records of the local office January 23, 1908. January 27, 1908, notice of the cancellation of the entry was given by registered letter to contestant's attorney of record, which was received January 28. The preference right period expired February 28, 1908, the day Wilcox died.

The erroneous advice given by the local officers, under the ruling of the Department in *Becker v. Bjerke*, that the heirs would be required to perfect the entry by actual residence upon the land, was the reason the heirs did not perfect the application March 17, 1908. The question involved in that decision was as to the right given to the heirs of the successful contestant by the act of July 26, 1892 (27 Stat., 270).

The rights of the heirs in this case are not controlled or affected by that act or by any expression in the decision referred to. A con-

testant acquires no right by the filing of his contest and the heirs of the contestant who continues the prosecution of the contest have no other or greater right than the contestant himself would have.

In this case a right to make entry had been initiated by Wilcox, and his heirs are entitled to perfect that right by making proper application therefor and fulfilling the requirements of the statute as embodied in section 2291, Revised Statutes.

Within three months from the death of Wilcox and the expiration of the preference right period, the heirs, by their agent, demanded that the original application filed by Wilcox be placed of record and, at the same time, tendered the fees and commissions required by law.

In the application, executed June 19, 1908, and filed with the papers, the agent of the heirs explains what was meant in stating that the heirs were not willing to live on the land. He says that they authorized him to tender the fees and commissions and complete the application, it being their belief that they could complete the entry the same as if it had been placed of record during the lifetime of the applicant.

The settlement of Wilcox upon the land was continued up to a few days before his death when he was removed therefrom because of injuries received, which caused his death. That was not an abandonment of the land and he was to all intents and purposes a settler on the land at the date of his death.

Your decision dismissing the protest of Turner and holding that the heirs of Wilcox are entitled to perfect the entry by complying with section 2291, Revised Statutes, is affirmed.

NORTHERN PACIFIC ADJUSTMENT—TIMBER AND STONE APPLICATION—ACTS OF JULY 1, 1898, AND MAY 17, 1906.

NATHAN P. STEVES.

An application to purchase under the timber and stone act, accompanied by a tender of fees, presented before, but upon which proof and payment were not made until after, May 31, 1905, does not present a claim subject to adjustment under the act of July 1, 1898, as extended by the act of May 17, 1906.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, April 2, 1910.* (S. W. W.)

The Department has considered your office letter of March 21, 1910, submitting for approval Washington list No. 365, of lands to be relinquished by the Northern Pacific Railway Company under the provisions of the act of July 1, 1898 (30 Stat., 597, 620), as extended by the act of May 17, 1906 (34 Stat., 197).

It appears from your said letter that the tract involved, namely, the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 7, T. 5 N., R. 15 E., Vancouver, Washington, land district, is within the overlap of that portion of the Northern Pacific Railway Company's constructed branch line and the withdrawal made on account of the unconstructed main line; that it was selected by the company per indemnity list No. 8, May 18, 1885, which list was canceled by your office January 15, 1892, as being a part of the government moiety; that on the date of April 25, 1905, the Department directed that the company should be credited with the full amount of the odd sections within the primary limits of its constructed branch line, and on May 31, following, the local office was directed to make no further disposition of the lands within the odd-numbered sections within the primary limits or any selected lands within the indemnity limits within the overlap mentioned.

It is further stated that on May 25, 1905, Nathan P. Steves filed timber and stone application No. 4836, serial 03893, for the tracts above described, upon which no action appears to have been taken until September 18, 1905, when he submitted final proof, after due publication; that the final proof bears evidence that a special agent was present when the same was made and cross-examined the claimant and his witnesses, and that he knew of no reason why final receipt should not issue; that the local officers rejected the proof on account of conflict with the company's list of selections, and on September 28, 1905, returned to the claimant the amount paid upon the claim, \$310.

It is further stated that on November 25, 1905, the local officers vacated their previous action of September 28, and directed the claimant to forward to the receiver the sum of \$310, as fees and purchase price for the said tract; that on November 3, 1906, the local officers advised Steves that his claim appeared to come within the provisions of the acts of 1898 and 1906, *supra*, and allowed him thirty days within which to make his election thereunder, and on November 24, 1906, Steves's election to retain the tracts in question was forwarded to your office.

It is further stated that by your office letter of August 5, 1907, it was held that the tender of payment of fees due on this entry, which it is alleged was made by Steves at the time of the presentation of his application, did not constitute a purchase such as to bring the case within the terms of the acts, and Steves was accordingly allowed sixty days within which to appeal, and evidence having been submitted showing service of notice by your letter of June 2, 1908, Steves's application to make timber and stone entry and his election to retain the tract, were rejected.

It is suggested in your said letter that under the rule laid down by the Department in the case of *Rufus Allyn v. Northern Pacific Railway Company* (37 L. D., 604), the application of Steves may be con-

sidered an entry within the meaning of the acts, and while the facts in this case are not similar in all respects to those in the case cited, your office is of the opinion that Steves is entitled to an adjustment of his claim under said acts.

The matter has been carefully considered and the Department is of the opinion that this case is not controlled by the decision in the case of *Allyn v. Northern Pacific Railway Company*, above cited. In that case the claimant, the timber and stone applicant, had not only presented his application but he had also published notice and made final proof, and also tendered the purchase price, prior to May 31, 1905, the date mentioned in the act of 1906, and even before that date the proof had been examined by your office and returned to the local office with instructions that the entry should be allowed.

In this case the applicant had only tendered his application and he did not make proof and tender payment for the land until some months after the date mentioned in the act of 1906. This case is therefore not controlled by the *Allyn* case but rather by the case of *Jones v. Northern Pacific Railway Company* (34 L. D., 105); where it was held that an application to purchase under the provisions of the act of June 3, 1878, presented prior to, but upon which proof and payment were not made until after, January 1, 1898, does not present a claim for adjustment under the provisions of the act of July 1, 1898.

As above stated, this land was selected as indemnity by the company on May 18, 1885, and the selection, which was erroneously canceled January 15, 1892, is shown to have been reinstated by your office letter "F" of January 26, 1906. The receiver's receipt issued to the timber and stone applicant, Steves, under date of November 15, 1907, long after the reinstatement of the company's selection.

I must therefore decline to approve the list submitted and the same is herewith returned. Under the facts as stated by your office letter the timber and stone application must be rejected.

COAL LANDS—WITHDRAWAL—CONFLICTING APPLICATIONS.

DEMPLE v. COE.

If an application to purchase, under section 2347, Revised Statutes, is presented and accepted at a time when the land is not subject thereto, but, upon elimination of the obstacle, is prosecuted openly and regularly to completion, without objection or adverse application by another in the interval or within a time reasonably sufficient for the prosecution of such proceedings, were the earlier application not suspended or impeded by any rule or action of the land department which would be equally applicable to a later application, the first should be sustained. If, however, a later applicant seasonably after the restoration presents his application and seeks to perfect it, the first and premature application should not enjoy an unfair advantage because of priority, but the other should be preferred.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, April 4, 1910.* (F. H. B.)

The north half of the southwest quarter and of the southeast quarter of Sec. 26, T. 57 N., R. 84 W., 6th P. M., together with other tracts in the Buffalo, Wyoming, land district, were on July 27, 1906, by Executive order, withdrawn from entry for the purpose of their classification, and thereafter, by order of October 10, 1907, they were officially classified as coal lands, to be sold at \$40 an acre, and were restored to entry accordingly.

As between the parties to the present controversy, the most westerly forty-acre subdivision, only, of the above-described tracts (*i. e.*, the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$) is involved, although the remaining three forties are included in the case under the application to purchase filed by one of the parties.

The four forty-acre subdivisions have been involved in earlier controversies, preceding the withdrawal and subsequent restoration, which were brought up to the Department and which included, successively, a homestead entry by one Lynch; an offered coal declaratory statement by William Frackelton, which the local officers rejected because of the pendency of the homestead entry, followed forthwith by Frackelton's protest against that entry, and soon thereafter by a hearing between those parties; the presentation of a coal declaratory statement and an application to purchase by C. N. Dietz, both of which the local officers rejected because of the pending homestead entry; Lynch's relinquishment of his entry, and on the same day a purchase and entry by Frackelton, under the coal-land laws; a protest thereupon by Dietz, who claimed a preference right of entry under section 2348, Revised Statutes, and a hearing between himself and Frackelton; a final determination, upon the evidence, that Dietz had acquired no preference right of entry, and, consequently, the dismissal of his protest, and at the same time the cancellation of Frackelton's entry, it having been disclosed that the entry was preceded by his agreement to convey, and by his conveyance of, an undivided half interest in the property.

A few months later, and on October 12, 1906, Dietz again applied to purchase, under the coal-land law, the tracts first above described. In the meantime, however, as also first above stated, the land had been included in an Executive order of withdrawal, and for that reason his application was rejected by the local officers. Their action was successively affirmed by your office and the Department, the last revisory step being the Department's denial of a motion for review, January 29, 1909, and the case was formally and finally closed by your office on February 6, 1909.

These preliminary and explanatory statements are in aid of an understanding of the present case, which is now to be considered.

October 8, 1907, or two days prior to the Executive order whereunder the several subdivisions were officially classified and restored to entry, and also between the presentation and rejection of the Dietz application and the final affirmance of its rejection, Oscar A. Demple, one of the parties hereto, presented at the local office, and was improperly allowed to file, his application to purchase, under section 2347 of the Revised Statutes, the four forty-acre subdivisions above mentioned. The application was thus received and accepted in disregard of the yet existing withdrawal, but was indorsed by the register, "Suspended, pending appeal of C. N. Dietz." It further appears, as subsequently reported by that officer, that no notation of the application was made upon the records of the local office, and that "neither was there any notation upon the plats or tract books showing the condition of the Dietz application."

In this situation, and on May 19, 1908, several months after the classification and restoration of all land here involved, but during the pendency of Demple's application and of Dietz's appeal to the Department in his case, Earl B. Coe, Jr., the other party hereto, filed his application to purchase, under section 2347, Revised Statutes, the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of the aforesaid section 26. Pursuant to the requirements under paragraph 17 of the regulations approved April 12, 1907 (35 L. D., 667, 670), he published and posted notice of his application, without eliciting objection from Demple or others as far as disclosed by the record; and on July 20, 1908, he made entry and received final certificate thereof.

The record in the matter of that entry having reached your office in due course, it was there held, November 30, 1908, that as the land involved was embraced in the case of Dietz (at that time still before the Department) the entry had been erroneously allowed; and Coe was cited to show cause why it should not be canceled. But he appealed, and by decision of May 7, 1909, the Department, after reciting the course, and the conclusion, in the meantime, of the Dietz case, reversed the decision of your office, saying:

The appeal of Dietz from the rejection of his application entitled him only to a judgment as to the correctness of the action of the local officers at the time it was taken, and Coe's application to enter, filed during the pendency of the appeal and after the land had been classified and restored to entry under the coal-land laws, should have been received and suspended until final disposition of the appeal.

Therefore, while the allowance of the entry was, in the face of the then pending application of Dietz, manifestly irregular, there would seem to be at the present time no reason why it should not be permitted to remain of record notwithstanding its irregular allowance, and, in the absence of other objection, passed to patent.

When considered in turn by your office and the Department, the Coe case was treated as *ex parte*, as it then appeared on the record brought up. But meanwhile (the Dietz case having first been closed) the local officers permitted Demple to publish and post notice of his application, as required by the regulations, and on April 15, 1909, to submit his proofs and make payment, at the classification price, for the entire area embraced in his application, one forty-acre tract of which was already covered by Coe's entry. It seems that your office had previously telegraphed the local officers to allow no entry for the land in question (for reasons that shortly afterward ceased to exist), on which account, probably, the register withheld the final certificate of entry.

In that state the record was forwarded to your office, and was soon followed by a report from the register, in which attention was called to the various proceedings in which the tracts have been involved and to the irregularities and conflict with respect to the claims of Demple and Coe.

In due course your office, by decision of September 16, 1909, after briefly stating the case and referring to the rejection of Dietz's application because of the then subsisting withdrawal, held that Demple's application was subject to the same objection and that it was error to receive it and to permit proof and payment under it, and directed its rejection.

Thus involving the conflicting claims of Coe and Demple, the case now comes before the Department on the latter's appeal; and on behalf of both, in addition to the submission of briefs, counsel have been heard in oral argument.

Without reference to the application and entry of Coe, and upon the ground of inherent invalidity, the application of Demple is held for rejection in the decision now to be reviewed. Here, too, it may be observed, as apparent from the foregoing statement, that equally for the reasons embodied in the quoted portion of the departmental decision of May 7, 1909, *supra*, and as far as the present case is concerned, the Coe entry should stand or fall according to the status of Demple under his application, which was the prior in point of time, and the proceedings subsequently prosecuted to perfect it. That status becomes at once, therefore, the subject of inquiry.

It is, of course, true that, as stated by your office, at the time Demple's application was presented at the local land office—two days prior to the official order of classification and restoration of entry, and several days prior to the receipt and notation of the order at the local office—it was no more entitled to acceptance than was the like application of Dietz, and should have been met with a rejection in the same manner. The withdrawal within which these and surrounding lands of the region were included, albeit but temporary in design

and the revocation of which was then immediately impending, was of the same force and effect on the respective dates when the Dietz and Demple applications were offered. Counsel for Coe urge, therefore, that they are so alike in plight that no substantial distinction can correctly be drawn in Demple's favor, and that now to accord effective recognition to his application because of the action erroneously taken by the local officers, the bar of the withdrawal being now removed, would of necessity concede the like (but prior) right to Dietz.

But the contention is not sound. The Department long ago had occasion to recognize, as definitely stated in *Calhoun v. Daily* (14 L. D., 490, 492), a clear and substantial distinction between those improperly proffered applications to initiate claims (the lands being otherwise appropriated or reserved at the time) which are rejected, and which are held not to attach under pending appeals upon release of the lands, and those applications which under like circumstances were erroneously accepted, the barrier meanwhile disappearing. Of the first class is the application of Dietz, with respect to which the action of the local officers was right, and under which no immediate or prospective interest attached or was reserved through the appeals from the order of rejection. *McInturf v. Gladstone Townsite* (20 L. D., 93). As pointed out in the departmental decision of May 7, 1909, *supra*, he was entitled, upon appeal, only to a decision respecting the action of the local officers at the time it was taken; that action was sustained, the appellant had his day in court, and that case is closed.

That it was error to allow the Demple application to be filed, and that it should at that time have been unconditionally rejected, there can be, of course, no question. The fact remains, however, that it was not so rejected, but was accepted and filed and was thereupon merely held in abeyance—"suspended"—to abide the determination of the then pending appeal of Dietz. As far as the present record goes, it would appear that Demple was thus misled and lulled into a sense of security as to all questions pertaining to the land involved other than as to that appeal. In recognition of such just claims to equitable consideration, in different classes of cases, it has been uniformly held that an entry (as the record origin of a claim) of land held in reservation or for other reason not subject thereto, made and maintained in good faith under color or claim of right, will, if the land has since become subject to that class or character of entry, and in the absence of intervening adverse rights, be permitted to remain intact as having attached when the land became subject to entry. The rule and its application are found in the cases of *The Dobbs Placer Mine* (1 L. D., 565); *Meyers v. Smith* (3 L. D., 526); *Alexander Polson* (4 L. D., 364); *Owen D. Downey* (6 L. D., 23); *Schrotberger v. Arnold* (6 L. D., 425); *Frank V. Holston* (7 L. D.,

218); Moss Rose Lode (11 L. D., 120); Richard Griffin (11 L. D., 231); Linville *v.* Clearwaters (11 L. D., 356); Thomas *v.* Spence (12 L. D., 639); Calhoun *v.* Daily (14 L. D., 490); Thunie *v.* Railway Co. (14 L. D., 545); John W. Imes (15 L. D., 546); Bomgardner *v.* Kittleman (17 L. D., 207); Settoon *v.* Tschirn (19 L. D., 1); James M. Dewar (19 L. D., 575); Oscar Sassin (20 L. D., 12); St. Paul, etc., Railway Co. *v.* Hagen (20 L. D., 249), and Barbour *v.* Wilson (28 L. D., 61).

For the most part those decisions had to deal with original homestead entries (occasionally a preemption declaratory statement) placed of record when the lands involved were covered by entries of the same or equivalent character, or by State selections, etc., subsequently relinquished or canceled; but in one of them the barrier had been an Indian reservation, in another a military reservation, and in a third a completed entry under the mining laws. Obviously, the Executive withdrawal in this case would be of no higher force.

Whilst an application to purchase under the coal-land law can not of itself be said to secure to the applicant a *jus in re*, and is hardly of the dignity of a homestead entry, which is recognized as an appropriation and segregation of land, nevertheless the law (Sec. 2347, R. S.) provides that upon "application" to the register a qualified person or association shall "have the right to enter," according to the established legal subdivisions, the "vacant coal lands of the United States not otherwise appropriated or reserved by competent authority," not exceeding 160 or 320 acres, respectively. As the qualification contained in the clause last quoted ceased to figure in the case at bar, by virtue of the revocation of the withdrawal and the restoration of the lands and under the decisions above cited, there would seem to remain, therefore, a pending application submitted in apparent good faith by Demple, improperly received and filed at the time it was presented but effective, as between him and the Government, when by the restoration the land became subject thereto, whereunder he should have, in the absence of adverse rights, and in the language of the statute, "the right to enter," and did in fact submit the requisite proofs and payment as soon as advised by the local officers of the termination of the Dietz case. Do, then, the application and entry presented and perfected by Coe in the interval represent the attachment of an adverse claim or right which would foreclose, as to the tract in conflict, the prosecution of Demple's application to an entry thereafter?

Taking the more common instance, among the cases above cited, of a homestead entry made before the land became subject thereto and without other steps taken by the entryman to give effect to his claim, a *bona fide* settlement upon and cultivation of the land by another, intermediate the erroneously allowed entry and the time when

the land becomes subject to such an entry, would clearly constitute an intervening adverse right or claim which would intercept and defeat the irregularly allowed entry. But such an hypothetical case involves an act or acts relating to a physical occupancy and use of the land which would suffice for that purpose without an immediately accompanying entry or filing of record on the part of the adversely intervening claimant. It is, however, an illustration sufficiently comprehensive to indicate the difficulty in the way of an analogy to control the case at bar; for here but two successive applications to purchase are involved. If the pending application of Demple had been confronted, at the date of the restoration of the land, with "a preference right of entry" theretofore acquired by Coe pursuant to section 2348, Revised Statutes, a satisfactory analogy could be found; but that is not this case. And upon the theory that the premature Demple application is to be regarded as taking effect *eo instanti* the lands were restored, no right under another's mere application could in that sense, in the nature of things, intervene; for if the latter also preceded the restoration they would be equally irregular, and the mere matter of priority would then probably govern. To meet the difficulty, therefore, there seems to be left a choice between but two courses: (1) Either in respect of such cases as this to qualify the principle embodied in the foregoing decisions, as to the attachment of the premature application upon the removal of the barrier thereto, or (2) to consider the application and entry of Coe intermediate Demple's application (and the restoration of the land) and Demple's proof and payment as an intervening adverse right within the purview of the principle.

The latter course seems at once unacceptable, for not only is it wholly inconsistent with any reasonable view of an intervening adverse right within the contemplation of the rule laid down in the above cited decisions, but it would recognize in Coe a legal advantage in the postponement of the proofs and payment under Demple's application, by the suspension enforced by the local officers, far beyond the time when otherwise they could easily have been submitted—a postponement which should equally have been imposed upon Coe for the same reason.

In support of the first course, then, it may be pointed out that if an application to purchase, which is offered at a time when the land is not subject thereto and is erroneously accepted by the local officers, is to be held to take effect as of right and in any case upon the restoration of the land; it would necessarily follow that another who chose to proceed regularly and present his application after the restoration would find himself cut off by the attachment in the meantime of the earlier application. This would but set a premium upon the prema-

ture, and penalize the later and regular, application, and would be manifestly wrong.

Amid the complications of the case at bar the positions of the parties, from an equitable point of view, would seem to be about equal. Ignoring the yet existing withdrawal, the application of Demple was accepted and then held in abeyance to await the disposition of the Dietz appeal; in disregard of both the pending application and the pending appeal, the application of Coe was accepted and a purchase and entry thereunder allowed; in further disregard of that entry, Demple was permitted to submit proof and make payment for all the land, including the tract covered by the entry of Coe. True, as above observed, Coe gave due notice by publication of his application, of which Demple took no cognizance. At the same time, the latter then had his own application on file, awaiting the course of the Dietz appeal, and by paragraph 12 of the regulations of April 12, 1907, *supra*, as in the earlier regulations on the same subject, the local officers were expressly directed to "allow no party to make final proof and payment except on special written notice to all others who appear on their records as claimants to the same tract." No such notice appears to have been given to Demple, and it would be going far, under the circumstances, to question his reliance upon his pending application. Throughout, in fact, each of the parties appears to have been ignorant of the presence and procedure of the other.

It seems to the Department, therefore, an unavoidable conclusion, that if in such a case the earlier application is accepted at a time when the land involved is not subject thereto, and that if, upon the elimination of the obstacle, the application is prosecuted openly and regularly to completion, without objection or adverse application by another in the interval or within a time reasonably sufficient for the prosecution of such proceedings, were the earlier application not suspended or impeded by any rule or action of the land department which would be equally applicable to the second application, the first should be sustained. On the contrary, if, with a due regard for regularity of procedure, the later applicant seasonably after the restoration presents his application and seeks to perfect it, the first and premature application should not then enjoy an unfair advantage because of priority in time, but the other should be preferred. Of course, collusive or fraudulent conduct on the part of either party would vary the rule according to circumstances, but the foregoing is upon an assumption of good faith in both.

What is here held is not inconsistent with the circular of January 21, 1907 (35 L. D., 395), or the cases of Charles S. Morrison (36 L. D., 126; *Id.*, 319) and Esther F. Filer (36 L. D., 360), upon which your office relied, neither of which had in contemplation the case of

an application filed, and improperly accepted, during the existence of a withdrawal but presented for consideration after the revocation.

In the case at bar it appears, for aught to the contrary, that Demple filed in good faith and that his application was thereupon held by order of the register to await, and did so await, the final decision in the case of Dietz. Coe, on the other hand, did not appear until seven months after the revocation of the withdrawal and restoration of the lands, and early in that time Demple might easily have prosecuted his own application to a purchase and entry but for the suspension imposed upon him, which should equally have barred the proceedings on Coe's part. In this situation it is the judgment of the Department, as far as the record before it is concerned, not only that Demple should receive final certificate for the three forty-acre subdivisions not embraced in the conflict, but that as to the remaining subdivision in controversy he is to be preferred. If, therefore, no objection thereto shall be disclosed outside of this record, further proceedings to that end will be permitted and had, and in that event the entry of Coe will be canceled.

This leaves nothing which it is necessary to consider in the case, except certain statements in the brief of Demple's counsel, which impute to Coe a collusive and illegal relation with the former applicant Dietz, and which Coe's counsel move to strike as scandalous and impertinent. In the interest of dispatch it is deemed sufficient to say that those statements appear to be gratuitous, and they have been ignored here.

The decision of your office is reversed.

**HOMESTEAD CONTEST—ADJUDICATION OF COAL CHARACTER—ACT
OF MARCH 3, 1909.**

MARTIN v. GILBERT.

The fact that at the date of the act of March 3, 1909, the land embraced in a homestead entry had been, in a contest proceeding then pending, adjudicated by one of the tribunals of the land department to embrace land chiefly valuable for coal, will not deprive the entryman of the right to a patent under that act, if otherwise within its terms.

First Assistant Secretary Pierce to the Commissioner of the General
(O. L.) *Land Office, April 4, 1910.* (E. P.)

The land involved in this case is lot 1, Sec. 1, and lots 2 and 3, Sec. 12, T. 2 S., R. 2 E., W. R. M., Lander land district, Wyoming. The land was opened to settlement and entry pursuant to the President's proclamation of June 2, 1906 (34 Stat., 3208), issued under the provisions of the act of March 3, 1905 (33 Stat., 1016).

October 3, 1906, John A. Gilbert applied to make homestead entry of said land, but his application was rejected because the township wherein the land is situated had been, pursuant to the order of July 26, 1906, "suspended and withdrawn from entry and filing under the public land laws." This order having been, on December 17, 1906, modified so as to direct the withdrawal of said land from coal entry merely, Gilbert again, on December 19, 1906, presented his homestead application, and entry was on that date allowed.

October 29, 1907, Gilbert filed notice of his intention to submit commutation proof on said entry, and, after proceedings not necessary to be here stated, proof was submitted May 18, 1908.

In the meantime, to wit, on March 22, 1908, James W. Martin filed a protest against the entry, charging that the land is chiefly valuable for coal. Hearing was had on this protest July 7, 1908, as a result whereof the local officers, under date of September 11, 1908, found the land to have been known to be coal in character at the date of submission of final proof, and recommended that the entry be canceled.

From this decision Gilbert appealed, whereupon your office, by decision of September 10, 1909, sustained the findings of the local officers as to the character of the land, but, finding that the entryman seemed to have acted in good faith in the matter and was residing on the land, held that he would be entitled, under the provisions of the act of March 3, 1909 (35 Stat., 844), to elect to take a patent as therein provided, observing that—

In giving the claimant the right to elect to take patent for the surface, it is not overlooked that the land was withdrawn as probably containing deposits of coal prior to the homestead entry, and so remained withdrawn after the order of December 17, 1906, which permitted agricultural entries to be made thereon. It is not believed, however, that such withdrawal would operate to defeat the relief offered to claimant under the non-mineral land laws.

The entryman appears to have acquiesced in the finding of your office as to the character of the land. At any rate, he did not appeal therefrom, but, on September 15, 1909, executed a formal election to take a patent to the land pursuant to the act of 1909, *supra*.

The protestant, however, has appealed from so much of your said decision as permits the entryman to take such a patent, contending (1) that the entry was not made in good faith, within the meaning of the act of March 3, 1909; (2) that prior to the date of the entry the land in question was "claimed, classified or reported as being valuable for coal;" and (3) that said act, as shown by the text thereof, was not intended to apply to a case of this character, "where the claim of contestant that the land was coal land had been initiated and adjudicated in the district land office prior to the passage of the act."

The said act of March 3, 1909, provides—

That any person who has in good faith located, selected, or entered under the non-mineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal, may, if he shall so elect, and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine and remove the same: *Provided further*, That nothing herein contained shall be held to affect or abridge the right of any locator, selector, or entryman to a hearing for the purpose of determining the character of the land located, selected, or entered by him. Such locator, selector or entryman who has heretofore made or shall hereafter make final proof showing good faith and satisfactory compliance with the law under which his land is claimed shall be entitled to a patent without reservation unless at the time of such final proof and entry it shall be shown that the land is chiefly valuable for coal.

The contention of appellant that this act should be held to be inapplicable to a person whose entry, at the date of the approval of the act, had been, in a contest proceeding regularly initiated and prosecuted against the same by a private individual, adjudicated by one of the tribunals of the land department, to embrace land chiefly valuable for coal, does not impress itself favorably upon the Department. The act itself, which is obviously remedial in character, in express terms applies to "any person" who has in good faith located, selected or entered, under the non-mineral land laws of the United States, any lands which are subsequently classified, claimed or reported as being valuable for coal, and who shall submit satisfactory proof of compliance with the laws under which such land is claimed. No distinction whatever is made by the act between one whose entry was then under contest and one against whose entry no charge had been filed; and the Department is without authority to draw such a distinction. Hence, if the claimant in the case at bar shall be found to come within the terms of the act of March 3, 1909, he must be held to be entitled to a patent accordingly, notwithstanding the pendency of the contest against his entry at the date of the passage of the act and the establishment of the charge as to the coal character of the land.

The final proof submitted on the entry in question shows that the claimant established his residence on the land April 20, 1907, within six months from the date of the entry, and continuously resided there from that date to the time of submitting final proof; that in the year 1907 he plowed and seeded to oats, potatoes and alfalfa, 27 acres of the land, as the result of which fair crops were obtained, and also cultivated a garden; and that his improvements on the land, which consist of a frame dwelling, lathed and plastered, outhouses, cellar, well, fencing, shade trees, ditch, breaking, etc., are of the value of \$600 or more; that he has also acquired an interest, valued at \$600, in an irrigating ditch. The value of the land for agricultural purposes

is estimated by the witnesses who testified at the hearing had in this case to be from \$40 to \$100 per acre. It also appears that there are no coal outcroppings on the land, nor nearer thereto than 2,800 feet.

Upon a careful consideration of the evidence, the Department is of the opinion that the finding of your office and the local office, that the land was known to be coal in character at the date of submission of final proof, is clearly warranted. It is further of opinion, however, that the coal character of the land was not known to the claimant at the date he made his entry; that he has made full compliance with the commutation requirements of the homestead law in the matters of residence, improvement and cultivation, and that at the date of initiation of his claim he was in good faith endeavoring to secure the land under the non-mineral laws, and not because of its coal character.

It is to be noted that the entry in question was made previously to the issuance of the departmental circular of April 24, 1907 (35 L. D., 681), requiring lands theretofore withdrawn from coal entry and not relieved from such withdrawals to be entered on the tract books as "coal lands."

There being no surface indications of coal upon the tract involved, nor record evidence of withdrawal because of supposed coal value, either through notations upon the plats in the land office, or otherwise, at the time Gilbert's entry was allowed, it is believed that it can be safely held that this tract was not classified, claimed or reported as being valuable for coal before the allowance of Gilbert's entry. As a consequence, it follows that, the entry having been made in good faith, compliance with the requirements of the homestead law having been shown, and Gilbert having elected to take a restricted patent, the same should be issued to him, under the act of March 3, 1909.

The decision appealed from is accordingly affirmed.

**NORTHERN PACIFIC SELECTION—UNSURVEYED LAND—PROTEST BY
SETTLER—HEARING.**

HALL v. NORTHERN PACIFIC RY. CO. ET AL.

Determination of the issue raised by a protest against a selection of unsurveyed lands by the Northern Pacific Railway Company under the act of July 1, 1898, based upon adverse settlement rights, should not be postponed to await survey of the lands, but hearing to settle the controversy should be promptly had.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, April 4, 1910.* (J. R. W.)

The Northern Pacific Railway Company and Frank E. Alley, intervener, appealed from your decision of May 5, 1909, holding for

cancellation its selection, under act of July 1, 1898 (30 Stat., 597, 620), of N. $\frac{1}{2}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, T. 16 S., R. 4 E., Roseburg, Oregon.

August 21, 1907, the railway company applied to select these lands—unsurveyed. November 5, 1907, Richard G. Hall filed protest against the company's application, alleging settlement June 1, 1907, and continuous residence thereon subsequent thereto. No action was taken on the protest until September 21, 1908, when the local office cited Hall and the company to take testimony before a United States commissioner at Eugene, Oregon, November 4, 1908. October 28, 1908, Frank E. Alley, appearing as trustee for L. E. Bean *et al.*, moved to be made a party defendant, and requested continuance to the latter part of December, 1908. November 4, 1908, Hall, with attorneys and witnesses, submitted testimony in support of his claim to the land. The company defaulted. November 17, 1908, Alley filed motion to dismiss the contest. November 18, 1908, the local office held that no further proceedings should be taken at that time, but the protest and testimony submitted were transmitted to your office for consideration when the township official plat of survey had been filed in the local office. January 29, 1909, the local office approved the railway company's list of selections, which to that time it had held suspended to await action on the protests of Hall and another.

You held that the application for continuance by alleged transferees of the railway company was without merit, because no evidence of transfer had been filed in the local office, and those claiming to be transferees were not entitled to a hearing; furthermore, because the application for continuance was without merit or sufficient showing, and Hall's allegations had not been traversed.

Reviewing the evidence you held that it showed a valid settlement. In respect to the motion to dismiss, you held that a hearing was properly ordered, and that it was not necessary to hold Hall in suspense until the township plat of survey had been filed. As a conclusion, you held the testimony established the fact that a *bona fide* settlement claim had attached to the land and was subsisting when the company presented its selection, and that said claim defeated the selection.

It is assigned for error of your decision to hold that proceedings could be taken on Hall's protest prior to filing of the official plat of survey. The transferees rely on the decision in *Meyer v. Northern Pacific Railway Company* (31 L. D., 196), wherein it was held that a homestead applicant must show he established actual residence on the land within reasonable time after settlement and that he had maintained such residence to date of his application for homestead entry in order to defeat a railway selection under act of March 2, 1889.

The point here involved was not presented in the case cited. In that case Meyer did not file a protest against the railway company selection prior to the filing of the township plat, nor prior to the filing of his homestead application. It was not decided that one claiming to be a settler on unsurveyed public land must wait for a hearing until survey and filing of an application for entry himself. The question was decided under the similar act of June 4, 1897 (30 Stat., 36), in case of *Fred McCrimon v. George L. Ramsey*, September 13, 1902 (unreported). In that case McCrimon claimed settlement May 6, 1891; Ramsey claimed to have selected the land December 14, 1899. February 14, 1902, the land being still unsurveyed, McCrimon filed an affidavit asserting his settlement and praying a hearing as against Ramsey's selection. The Department held that:

As a question is raised as to whether the land is subject to selection, by one claiming an adverse occupancy, the interest of the parties required that it should be determined without awaiting a survey of the land, and such question can better be determined while the evidence is obtainable, than at some future time after witnesses may have removed, or died, and their testimony is lost to the parties and justice thereby defeated.

It is also the fact that an adverse claim, unadjudicated, hanging over a settler, tends to paralyze his effort at development of a farm and making a home, which is the very object of a settlement in good faith. The progress of the community is impeded. It is the right of a settler to challenge any adverse claim to land on which he has settled. It is also in the interest of a selector that the priority of right should be determined where a settler and selector seek to appropriate the same land. If in fact the settler has priority, the selection ought to be canceled, not only in interest of the settler, but in interest of the selector, that the base for his selection may not be tied up beyond his control. The land department has jurisdiction to try such a contest, because the title to the land, though unsurveyed, is in the United States and the land department is the only tribunal that has jurisdiction to determine such a question.

Your decision is affirmed.

HOMESTEAD—COMMUTATION PROOF—RESIDENCE.

MARY E. ELSON.

Commutation proof upon an entry made prior to November 1, 1907, submitted immediately after the expiration of fourteen months from date of entry, showing that residence was not established until just before the expiration of six months and that the entryman was absent an intermediate period of about two months during the succeeding eight months, will not be accepted as sufficient.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, April 5, 1910.* (J. H. T.)

Mary E. Elson has appealed from your decision of September 7, 1909, holding for cancellation cash certificate issued upon her homestead entry made November 6, 1905, for the NW. $\frac{1}{4}$, Sec. 34, T. 2 N., R. 20 E., Pierre, South Dakota, land district. Commutation proof was submitted January 10, 1907, and cash certificate issued on that date. You held the proof for rejection but allowed the original entry to remain intact subject to the submission of satisfactory proof within the lifetime of the entry.

Your action was taken upon the adverse report of a special agent, which was made December 14, 1907, alleging that the entrywoman did not establish and maintain residence upon the land. A hearing was duly had before the local officers, who recommended that the proceedings be dismissed. They found that the claimant had acted in good faith and that her absence from the claim from July 4 to the latter part of August, 1906, on account of sickness, should not prevent acceptance of proof. You joined with the local officers in finding good faith on the part of claimant, but held that the commutation proof was not sufficient, inasmuch as fourteen months' residence was not shown, the claimant having actually lived upon the land only about six months.

It appears that this is one of a number of entries made in that vicinity about the same time by persons who made commutation proof within about the shortest time possible and then discontinued residence, the claimants having formed a sort of "colony" as expressed in the testimony. This claimant testified that she had never seen the land embraced in her entry until she went to establish residence about six months after date of entry, although she had sworn in the nonmineral affidavit at the time she made entry that she was familiar with the character of the land, "having frequently passed over the same." In her commutation proof she and her witnesses testified that she had not been absent any of the time. By way of attempted explanation of this it is claimed that the correct facts were stated to the clerk who took the proof, and that he failed to write the answers down as given.

The house on the land is only 8 x 10 feet. It was inclosed with a small area of ground by an insecure wire fence, which also inclosed a shanty of an adjoining entryman, the fence having been placed there by a neighboring ranchman who used the main portion of the land in common with other range for the grazing of his cattle. The fence was no protection, as it is shown that cattle broke through and destroyed the garden which claimant had planted. She broke about five acres of the land and also cut and put up some hay. She had

no well upon her land, although she had started to dig one, having gone down about four feet. She established residence on May 4, 1906, and staid there until July 4, when she went away for business purposes, expecting to be absent about two weeks. After that her health was bad and she did not return to the land until the last days of August, the exact day of her return being indefinite, but it was about the first of September. She left the land next on January 8, 1907, and submitted the proof on January 10. Since then she has returned to the land only once for a short inspection and has not resided there.

It is thus seen that she submitted proof within about the shortest time possible, and that she was actually on the land slightly over six months. There are features in the case strongly reflecting upon the good faith of claimant and raising doubt as to her original intention of making the entry for a home, but as the special agent, the local office and your office unite in finding good faith, the Department will not disturb that finding.

It is believed that claimant should be given credit for the period between the date of entry and the time of establishing residence, which, added to the period of actual residence, leaves the period of residence about two months short of the necessary fourteen months. The period of residence required in commutation cases is so short that if any considerable portion of same be waived, practically no residence at all would be necessary to obtain patent. The two months' absence is a very large proportion of eight months, being one-fourth of the period. If claimant had actually lived on the claim eight months, this, with the constructive residence for the first six months, would have made the necessary fourteen months period, and the absence for two months because of sickness would not have been considered as breaking the continuity of residence and the proof would have been sufficient. But the residence shown is not sufficient. The absence for the cause stated and for the length of time shown did not break the continuity of residence in the sense that the two periods of actual residence may not be added together. They may be combined but the period of absence cannot be credited as residence. Sections 1 and 2 of the circular of October 18, 1907 (36 L. D., 124), read as follows:

1. Commutation proof offered under a homestead entry made on or after November 1, 1907, will be rejected unless it be shown thereby that the entryman has, in good faith, actually resided upon and cultivated the land embraced in such entry for the full period of at least fourteen months.

2. Where such commutation proof is offered under an entry made prior to November 1, 1907, if it be satisfactorily shown thereby that the entryman had, in good faith, established actual residence on the land within six months from the date of his entry, he may be credited with constructive residence from date of entry; provided it be also shown that such residence was, in good faith,

maintained for such period as, when added to the period of constructive residence herein recognized, equals the full period of fourteen months' residence required by the homestead laws.

This case is governed by section 2 of the above circular, as the entry was made prior to November 1, 1907. Said section did not announce a new rule, but simply reaffirmed for dissemination the prior and existing practice. The proof does not meet the requirements of the law.

Your decision is accordingly affirmed.

ROSEBUD INDIAN LANDS—EXTENSION OF TIME FOR PAYMENT.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 5, 1910.

REGISTER AND RECEIVER,
Gregory, South Dakota.

SIRS: Your attention is called to Sec. 2 of the act of Congress approved March 26, 1910 (Public, No. 108), which reads as follows:

That the time within which all unpaid payments which have heretofore or may hereafter become due and payable under the act entitled "An act to authorize the sale and disposition of a portion of the surplus or unallotted lands in the Rosebud Indian Reservation, in the State of South Dakota, and making appropriation and provision to carry the same into effect," approved March second, nineteen hundred and seven, except the cash payment required at the time of entry, be, and the same is hereby, postponed and extended for one year from the date on which such payments are now by law required to be made: *Provided*, That any payment not made within the time required by the act above stated and extended by the provisions of this act shall draw interest at five per centum per annum, and the interest, when paid, shall be credited to the proceeds of the sale of the land as provided in said act: *Provided further*, That such extension shall be subject to a full compliance by the entrymen with all requirements of the homestead laws as to residence and improvement.

This act by its terms extends the payments mentioned therein, and it will not be necessary for your office to take any action thereunder looking to such extensions.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

R. A. BALLINGER,

Secretary.

OKLAHOMA PASTURE LANDS—TIME FOR PAYMENTS EXTENDED.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., April 5, 1910.

REGISTER AND RECEIVER,

Lawton, Oklahoma.

SIRS: Your attention is called to section 3 of the act of Congress approved March 26, 1910 (Public, No. 108), which reads as follows:

That all payments heretofore due and extended, and the payments due or to become due during the year nineteen hundred and ten from entrymen who have made entry under an act entitled "An act to open to settlement five hundred and five thousand acres of land in Kiowa, Comanche, and Apache Indian reservations, in Oklahoma Territory," approved June fifth, nineteen hundred and six, and the act entitled, "An act giving preference right to actual settlers on pasture reservation numbered three to purchase land leased to them for agricultural purposes in Comanche County, Oklahoma," approved June twenty-eighth, nineteen hundred and six, are hereby postponed and extended as follows: One of said payments shall be made in nineteen hundred and eleven at the time when a payment would become due under existing law or one year after such payment became due in nineteen hundred and ten, and the other payments shall be made annually thereafter until all payments are made: *Provided*, That all payments postponed and extended by the provisions of this act shall draw interest at five per centum per annum from the date of such extension, and the interest when paid shall be credited to the proceeds of the sale of the land as provided in said acts: *And provided further*, That nothing in this act shall extend the time of payments in any case where it shall appear to the satisfaction of the Secretary of the Interior that the law in regard to residence and improvement, as provided by the homestead law, has not been fully performed.

This act by its terms extends the time of payments mentioned therein in all cases where the entrymen have complied with the requirements of the law as to residence and cultivation, and you will not be required to take any action granting such extensions; but, in all cases where you have information that the entrymen have not maintained the required residence and cultivation you will, as soon as the payments are due, at once notify such entrymen that their entries will be canceled and all former payments forfeited if they fail to make the required payments or show the necessary residence and cultivation by corroborative affidavits filed in your office within thirty days from the date of such notice. At the expiration of the thirty days mentioned, you will make due report to this office of the action of the entrymen under such notice and forward all affidavits filed by them.

If an entryman under the act of June 5, 1906, pays an installment of purchase money at the time it falls due in 1910, he will of course pay no interest. If, however, he takes advantage of the act of

March 26, 1910, permitting him to defer payment one year, he shall pay interest at the rate of 5 per cent per annum on the deferred payment from the time when the installment became due until the date of payment.

If an entryman under the act of June 28, 1906, pays an installment of purchase money at the time it falls due in 1910, he will pay interest thereon at the rate of 6 per cent per annum, as prescribed by said act of June 28, 1906. If, however, he takes advantage of the act of March 26, 1910, permitting him to defer payment one year, he shall pay, under said act of June 28, 1906, interest at the rate of 6 per cent per annum on the amount of the installment, to the date when the installment originally became due. Said installment and said interest, forming a payment due and deferred, shall together form a new principal, bearing interest at the rate of 5 per cent per annum under the act of March 26, 1910, from the time when the installment became due until the date of payment.

Interest on installments falling due subsequent to 1910 and deferred under the act of March 26, 1910, shall be computed in the same manner as on installments falling due in 1910.

Installments under the act of June 28, 1906, originally falling due prior to 1910, whereon an extension of time heretofore granted expires in 1910, and whereon a further extension of time is granted by the act of March 26, 1910, shall bear interest at the rate of 5 per cent per annum for the period from and after the expiration of said extension heretofore granted until the time of payment in 1911, the principal in this case being the amount of the installment plus the interest thereon at 6 per cent to the time when the installment originally fell due.

Homestead entrymen under the act of June 5, 1906, who have availed themselves of the extension of time granted by the acts of March 11, 1908, February 18, 1909, or March 26, 1910, will not be required to make final proof until the final payment is due under the extended time limit. They may, however, make payment of principal and accrued interest in full and submit final proof at any time after the expiration of five years from the date of entry, within the limit of time extension. Purchasers under the act of June 28, 1906, may likewise make payment of due and deferred installments with interest at any time prior to the expiration of the extended time limit.

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved:

R. A. BALLINGER, *Secretary*.

RED LAKE INDIAN LANDS—EXTENDING TIME FOR PAYMENT.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 6, 1910.

REGISTER AND RECEIVER,
Crookston, Minnesota.

SIRS: Your attention is called to section 1 of the act of Congress approved March 26, 1910 (Public, No. 108), which reads as follows:

That two years' additional time for paying the installments due or to become due is hereby given to the purchasers of homestead lands sold pursuant to the provisions of an act entitled "An act to authorize the sale of a part of what is known as the Red Lake Indian Reservation in the State of Minnesota," approved February twentieth, nineteen hundred and four; and no homestead entries under said act shall be canceled for nonpayment of installments of the purchase price until the expiration of the two additional years above named.

The act of February 20, 1904 (33 Stat., 46), requires payment of the purchase price to be made by installments, one-fifth at the time of entry and the remainder in five equal annual installments (32 L. D., 600). The act of June 21, 1906 (34 Stat., 325, 326), extended the period within which payment was required to be made for one year, and inasmuch as proof and payment must be made at the same time, it was held that the extension of time for making payment involves a corresponding time within which to make proof (35 L. D., 67).

The present act grants a further extension of time of two years for making payment, and included therein for the reason above given, is a similar extension of time for submitting proof.

Very respectfully,

S. V. PROUDFIT,
Assistant Commissioner.

Approved:
FRANK PIERCE,
First Assistant Secretary.

RIGHT OF WAY—RESERVOIR SITE—APPLICATION—DISCRETIONARY
POWER OF SECRETARY.

SIERRA DITCH AND WATER CO.

Whenever in his judgment the granting of an application for right of way under the act of March 3, 1891, over a national forest or reservation, would interfere with the proper occupancy of the reservation by the Government, it is within the power of the Secretary of the Interior to withhold his approval therefrom.

Prior to approval, the inchoate right acquired by an application for right of way over a national forest under the act of March 3, 1891, is subject to the power of Congress to deny the right by intervening legislation affecting the land.

First Assistant Secretary Pierce to the Commissioner of the General Land Office, April 6, 1910. (F. W. C.) (G. B. G.)

This is a motion on behalf of the Sierra Ditch & Water Company, for review of departmental decision of March 23, 1909 (not reported), rejecting the company's application as transferee of William Ham Hall under the acts of March 3, 1891 (26 Stat., 1095), and May 11, 1898 (30 Stat., 404), for right of way for Lower Twin Lake reservoir site, in and about unsurveyed T. 3 N., R. 21 E., Mt. Diablo Meridian, within the Yosemite National Park.

It appears that this motion was considered and formally denied by the Department May 18, 1909; but it would seem that while that decision on review is matter of record in the Mails and Files Division, it was not promulgated, the case being held up for oral argument and further examination.

The Lower Twin Lake reservoir site is within that tract or body of land first set apart by President's proclamation of February 22, 1897, as the Stanislaus forest reserve. It is also within so much of that reserve as was added to the Yosemite National Park by the act of February 7, 1905 (33 Stat., 702); and it is argued that whereas the application in question was made upon the day on which this territory was added to the Yosemite National Park and after the surveys of such site had been made and adopted by the company, this status brings such reservoir application strictly within the laws, rules and regulations governing applications for rights of way over national forest land, and that as to such reservoir the case is not complicated by the fact that the lands covered thereby were included in Yosemite National Park before action by the Secretary of the Interior has been had approving such application.

This suggestion is wholly without forcè. It cannot be successfully disputed that the Secretary of the Interior has some discretionary power in the matter of the approval of applications for rights of way under the act of March 3, 1891, *supra*; and, without reference to the larger disputed questions as to the extent of the discretionary power conferred upon the Secretary of the Interior by this act, it is undoubtedly and confessedly true that said act devolved upon him the duty of determining whether the right of way applied for as located would interfere with the proper occupancy by the Government of the reservation. Whatever else might be argued or concluded with reference to this act, it is undoubtedly true that rights of way thereunder attach in only two ways: (1) by construction of a ditch

or reservoir; and (2) by the approval of maps filed thereunder, subject to certain conditions subsequent. This being true, before a right of way may be acquired by the filing of maps, such maps must have first been approved by the Secretary of the Interior, and until such approval shall have been given the applicant acquires no rights which are not within the power of Congress to deny by intervening legislation. When, therefore, Congress placed the lands affected by this right of way within the Yosemite National Park, it had full authority to do so, without reference to any inchoate rights which may have been initiated upon these lands under existing legislation. Upon this question, therefore, it is thought that the rights of the company under its application for the Lower Twin Lake reservoir site are the same as though these lands had been made a part of such park prior to the initiation of any claim thereto by said company.

A larger question is raised by this motion, namely, whether the Secretary of the Interior may exercise a discretionary power generally in the matter of approving applications for rights of way under the act in question. It will not be necessary to pass upon that question in this case. For the purpose of this case, it will be enough to say that section 18 of the act of March 3, 1891, *supra*, provides that no right of way under said act "shall be so located as to interfere with the proper occupation by the Government of any such reservation." The act of February 7, 1905, by reference to the act of October 1, 1890 (26 Stat., 650), measurably defines and limits the proper occupation of the lands in question. They are thereby withdrawn from "settlement, occupancy, or sale under the laws of the United States." Persons who locate, settle upon, or occupy said lands, or any part thereof, except as therein provided, are to be considered trespassers and removed therefrom. Section 2 of said act of October 1, 1890, provides that the reservations thereby created shall be under the exclusive control of the Secretary of the Interior, whose duty it is to make and publish such rules and regulations as he might deem necessary and proper for the care and management of the same; among other things, that said regulations shall provide "for the preservation from injury of all timber, mineral deposits, natural curiosities or wonders within said reservation, and their retention in their natural condition." Further, the grant made by the act of June 30, 1864 (13 Stat., 325), to the State of California, of certain lands within the territory now known, strictly speaking, as the Yosemite National Park, was "upon express condition that the premises shall be held for public use, resort and recreation; shall be inalienable for all time; but leases not exceeding ten years may be granted for portions of said premises." The act of recession by the State of California of March 3, 1905, contained essentially similar provisions.

It is believed that an orderly administration of these acts does not permit of the granting of rights of way in the Yosemite National Park under the act of March 3, 1891. The proper occupation by the Government of the reservation might, and it is believed would be, thereby seriously interfered with. Upon consideration of the whole case, therefore, it is thought best to withhold approval of this application.

The motion for review is therefore denied.

ISOLATED TRACTS—PUBLICATION OF NOTICE—HOUR OF SALE.

CLANEY v. RAGLAND.

The period of publication of notice of sale of an isolated tract should close reasonably near the date of sale, but yet a sufficient time before such date to permit a copy of the published notice, with the affidavit of the publisher showing publication, to reach the local office before the hour of sale, making reasonable allowance for delay.

Local land offices, like other offices and business institutions generally, are run according to standard time, and a sale of public land advertised to take place at a local office at ten o'clock, means ten o'clock standard time, and not sun time.

Directions given that the regulations governing the sale of isolated tracts be amended to require that such sales be held open one hour after the time advertised therefor.

First Assistant Secretary Pierce to the Commissioner of the General
(O. L.) *Land Office, April 8, 1910.* (J. H. T.)

Harmon M. Clane has appealed from your decision of December 9, 1909, dismissing his protest against the public sale of isolated tract N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 5, T. 21 N., R. 8 W., 80 acres, O'Neill, Nebraska, land district.

By your letter of September 2, 1909, you authorized public sale of said tract under the isolated tract law, applicable to a certain area in the State of Nebraska, upon the application of Harmon M. Clane. The tract was sold November 18, 1909, to John C. Ragland, to whom cash certificate issued on that date. It appears that on September 29, 1909, the local officers prepared a notice of sale and forwarded it for publication to the Petersburg Index. In said notice the date of sale was fixed for November 18, 1909, at 10 o'clock A. M., at the local land office, and instructions were given to the printer to publish the notice for five consecutive weeks next preceding the date of sale. The notice was under said instructions published in said paper for five consecutive weeks, to-wit: October 1, 8, 15, 22 and 29; whereupon the publisher of said paper transmitted to the local officers proof of publication upon said dates as stated. November 5, the local

officers addressed to the publisher a letter stating the said proof was insufficient in that "this notice has not been published in accordance with instructions mailed you and the rules and regulations of the Department in such cases made and provided, in that the notice has not been published the required time *next prior to date of sale*," and required further publication. The notice was omitted from the issue of the said paper of November 5, but inserted in the issue of November 12, 1909.

The sale took place on November 18, 1909, between 10 o'clock and 15 minutes thereafter, it being stated that the sale was closed at 10.15 A. M., according to the office time. Ragland became the purchaser at the price of \$1.30 per acre, he being the only bidder. It appears that Claney reached the land office about 10.20 A. M., and in his protest claims that he was prepared to bid as much as \$5.00 per acre for the said land; but he was detained by a snow-bound railroad train, without fault on his part, and that the sale was not made in accordance with the regulations of the Department. He thus urges that the notice was not published for five consecutive weeks *immediately* or *next* prior to the date of sale, and also that the hour should have been determined by solar time instead of standard time, and further that the sale should have remained open for one hour.

The local officers report in the matter in part as follows:

As to the matter of time that the applicant Claney reached this office, we believe it to be about not less than twenty minutes after 10 o'clock according to our office time, the same being a clock used for that purpose in plain public view. This office is very careful in endeavoring to see that the instructions of your office are fully complied with by publishers and to that end publishers are instructed on the notices mailed them to publish the notice for five consecutive weeks next preceding date set for sale. The time set for sale is set far enough ahead to give ample time for the notice to reach the publisher and be regularly published. Notwithstanding our diligence in this respect, we have more or less defective notices. It appears the notice in the case at bar was published five consecutive weeks, at least there is no contention over that fact, but the claim is made that it was not published for five consecutive weeks next preceding date of sale. . . . It appears that the question is raised as to whether standard time or sun time should prevail in matters of this kind. This is the first time that a like question has been raised at this office during our incumbency, and we would like to be fully advised in that respect. We will add that Mr. Claney never received any information from this office that the sale would not take place promptly at the hour of 10 o'clock A. M., and that he certainly has no grounds for his understanding upon any information received at this office that the sale would not in fact take place until the expiration of one hour from 10 o'clock A. M.

Section 24 of the regulations dated October 28, 1908 (37 L. D., 225), by which publication in this case is governed, provides as follows:

When lands are ordered to be offered at public sale, the register and receiver will cause a notice to be published once a week for five consecutive weeks (or thirty consecutive days if a daily paper) immediately preceding day of sale, in

a newspaper to be designated by the register as published nearest to the land described in the application, using the form hereinafter given. The register and receiver will cause a similar notice to be posted in the local land office, such notice to remain posted during the entire period of publication. The register will require the publisher of the newspaper to file in the local office, prior to the date fixed for sale, evidence that publication has been had for the required period, which evidence may consist of the affidavit of the publisher accompanied by a copy of the notice published.

The notice was published in accordance with the said regulations and was not properly subject to the objection made by the local officers when they required the last publication of November 12. The publication prior to that time was complete and sufficiently near the date of sale. It would possibly have been better if publication had commenced with the issue of October 8, and had closed with the issue of November 5, rather than October 29. But closing with October 29 was preferable to closing with November 12, because it is necessary for the publisher to send a copy of the public notice with his affidavit showing proper publication, and this information must be in the local land office prior to the time of sale. Therefore a reasonable time should be allowed for delay. To literally follow the direction given by the local office to publish the notice for five consecutive weeks *next* (or *immediately*, as used in the instructions) preceding date set for sale, would not be making proper allowance for delay, which in this case would have been only five clear days, and in other cases might be much less, for preparing the proof of publication and transmission of same to the local office. The word *immediately*, in its strictest sense, excludes all intermediate time, but it is generally held that it has not necessarily so strict a meaning, but may be more liberally interpreted according to the context of the instrument embracing it and the nature of the performance affected by it. It has been variously defined as denoting closeness of connection; reasonable time; such convenient time as is reasonably requisite for doing the thing; and is held to be a relative term having relation to the course of business with reference to which it is used. See Vol. 4, Words and Phrases Judicially Defined, pages 3393-3410, and Bouvier's Law Dictionary.

According to the view of the Department, the additional publication made on November 12 was unnecessary and was simply surplusage, and cannot be given the effect of breaking the continuity of the publication, which was complete and sufficient prior to that time.

Protestant urges objection that the sale was closed at 10.15 A. M., standard time instead of sun time, and that sun time is much later than standard time at O'Neill where the sale was held, and that if it had been conducted by sun time he would have arrived prior to the closing of the sale. He also insists that the sale should not have been

closed until 11 o'clock under the rule governing judicial sales in the State of Nebraska, which he says requires such sales to remain open one hour. These contentions are without merit. The offices of the Government are run according to standard time as are banks, railroads and other business institutions. The protestant was not misled by the alleged error in publication nor by failure of the notice to state that the hour of sale would be determined by standard time. His failure to be present at time of sale was due to a storm which delayed his train. He knew the time and place of sale and was attempting to reach there. The trouble was with the train and not with the notice of sale. According to the regulations under which this sale was held the local officers are required to offer the land for sale "at the time" fixed for the sale, and "after all bids have been offered the local officers will declare the sale closed." The Department therefore holds that under the instructions in force, the sale was regular and that there is no authority for setting same aside. The protest is accordingly dismissed.

However, the circumstances in this case indicate the advisability of amending the regulations governing the sale of isolated tracts so as to require that such sales be held open for a reasonable time after the hour advertised, so as to provide for contingencies, and it is believed that one hour is a sufficient time for such sale to remain open. You will therefore prepare such amendment to the regulations for departmental consideration.

Your decision is affirmed.

INDIAN ALLOTMENT—SEC. 4, ACT OF FEBRUARY 8, 1887—REIN-
STATEMENT.

LACEY *v.* GRONDORF ET AL.

An Indian settler on public land, claiming the right to allotment under section 4 of the act of February 8, 1887, is in practically the same situation and governed by the same rules, practice and decisions applicable to white settlers on public lands.

Where a departmental decision has become final under the rules, has long been acquiesced in, the lands involved disposed of thereunder, and such disposition was not unlawful, a petition to reopen the case will not be entertained on the mere allegation of error in construing the law, based on a later and different construction by the Department.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, April 12, 1910.* (C. J. G.)

An appeal has been filed by Louis Lacey from the decision of your office of December 6, 1909, denying application for reinstatement of his allotment for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 14, T. 21 N., R.

9 E., Great Falls, Montana, now covered by the homestead and cash entries of Robert Grondorf and August Heydt.

August 26, 1892, Sophia Lacey, an Indian of the Piegan tribe, applied to have allotted to her minor child, Louis Lacey, under the 4th section of the act of February 8, 1887 (24 Stat., 388), a tract of unsurveyed land, as above, which upon survey was described as lots 2, 3, 5, and 6. The allotment was approved by the Department May 11, 1893, and subsequently charges were brought against the same by one William Sudbrocker, who alleged that the allottee never settled upon the land, and also that he was the son of a white man, Thomas Lacey, a citizen of the United States. A hearing was had, and the allottee being a minor it was determined that settlement was not required of him. Upon the remaining charge—namely, that the allottee was the child of a white man—the record was sent to the Indian Office for consideration. That office returned the case April 17, 1902, holding that under the rulings of the Department Louis Lacey, being the child of a white man, a citizen of the United States, was not entitled to an allotment under the 4th section of the act of February 8, 1887. The allotment was held for cancellation by your office May 14, 1902, and no appeal having been taken, was canceled January 12, 1903, such action being based on the decision in the case of Enoxix Buckland (30 L. D., 606), which followed the case of Ulin *v.* Colby (24 L. D., 311), wherein it was held:

Children born of a white man, a citizen of the United States, and an Indian woman, his wife, follow the status of the father in the matter of citizenship, and are therefore not entitled to allotments under section 4, act of February 8, 1887, as amended by the act of February 28, 1891.

It appears that Sudbrocker entered the land under the desert-land law, and that his entry was canceled upon relinquishment January 12, 1903. On November 8, 1905, Robert Grondorf made homestead entry for lots 3, 5, 6, and 8, Sec. 14, upon which final certificate issued February 20, 1909, and September 26, 1908, August Heydt was allowed to purchase as isolated tracts lots 1, 2, and 4, said Sec. 14. From his final proof it appears that Grondorf settled upon the land covered by his entry February 10, 1904. He built a house, 16 by 24, stable, outhouses, fences, broke thirty-five acres which he cultivated each season—the value of his improvements being estimated at \$1,000. His absences from the land did not aggregate ten days in each year.

In instructions of May 3, 1907 (35 L. D., 549), to the Indian Office, the case of Ulin *v.* Colby, *supra*, was overruled, it being stated in said instructions:

If the practice has been to refuse allotment to those having white blood, it was a mistake. The quantum of Indian blood or of white blood possessed by the applicant does not control, and should not, of itself, influence the decision as to his right to an allotment. One who is recognized by the laws and usages of an Indian tribe as a member thereof, or who is entitled to be so recognized,

must be held qualified to take an allotment out of the public lands under the 4th section of the act of February 8, 1887, as amended by the act of February 28, 1891.

Based on this ruling, a protest was filed in behalf of Louis Lacey against issuance of patents to Grondorf and Heydt, on the ground that the cancellation of his allotment was clearly a mistake of law. It was asked that the homestead and cash entries of Grondorf and Heydt be canceled as to lots 2, 3, 5, and 6, that Lacey's allotment be reinstated as to said lot, and patent issue thereon. It is urged that Lacey, being a minor and ward of the Government, is not subject to the imputation of laches, and in support of his application for reinstatement, reference is made to several cases, among them that of *Hy-yu-tse-mil-kin v. Smith* (194 U. S., 401).

There is a clear distinction, so far as conflicting claims are concerned, between the case referred to, which involved the conflicting claims of two Indian allottees to tribal property, and the case of Lacey, for whom an allotment was selected out of the public domain. The 4th section of the act of February 8, 1887, provides:

That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations.

This act was designed to afford to Indian settlers upon public lands the same privilege of entering such lands as white settlers. While allotments made under said section are necessarily on the theory that the allottees are Indians, yet they are not in the same situation as are allottees of tribal lands where rights flow from some specific act for the division of tribal property in which each member of the tribe has an inherent individual interest. Indian settlers under the above section are on practically the same footing as white settlers on the public lands. It has been held that section 4 of the act of February 8, 1887, is in its essential elements a settlement law, and that "to make such act effective to accomplish the purposes in view, it was doubtless intended it should be administered so far as practicable like any other law based upon settlement." *Indian Lands—Allotments*, 8 L. D., 647; *Instructions*, 32 L. D., 17. So that the practice, rules, and decisions governing white settlers on the public lands are, with certain reasonable modifications due to the habits, character, and disposition of the race, equally applicable to Indian settlers.

At the times Grondorf made homestead entry and Heydt his purchase, the allotment of Lacey had long since been canceled under the rule then in force, that the children of a white father and an Indian woman are not entitled to allotments under the fourth section of

the act of February 8, 1887. Upon such cancellation the land covered by the allotment became vacant and subject to entry by the first legal applicant. Grondorf has submitted final five year proof under his homestead entry showing full compliance with law, and, so far as this record shows, Heydt acted with equal good faith in respect to his purchase.

If the ruling announced in the instructions of May 3, 1907, *supra*, which overruled the case of Ulin *v.* Colby, had been in force at time of the cancellation of the Lacey allotment, a different conclusion might have been reached, if, as a matter of fact, his mother was a member of an Indian tribe and living on the public land, as required by the 4th section of the allotment act. But such was not the rule, and, while the cancellation of said allotment now appears to have been erroneous in the light of said instructions, the fact that adverse rights have attached to the land on the faith of the action then taken, precludes favorable consideration of the present petition; in other words, the ordinary rule is applicable here, which is that where a departmental decision has become final under the rules, has long been acquiesced in, the lands involved have been disposed of thereunder, and such disposition was not unlawful, a petition to reopen the case will not be entertained on the mere allegation of error in construing the law.

The decision of your office herein is affirmed.

INDIAN ALLOTMENTS—TRUST PATENTS—AUTHORITY TO CORRECT—
ACT OF APRIL 23, 1904.

INSTRUCTIONS.

The act of April 23, 1904, limits and defines the jurisdiction of the Secretary of the Interior to cancel first or trust patents on Indian allotments, and he has no authority or discretion to correct errors in the issuance of such patents except as specifically authorized by that act.

First Assistant Secretary Pierce to the Commissioner of Indian Affairs, April 13, 1910. (O. L.) (C. J. G.)

The Department has received your letter of March 28, 1910, relative to the act of April 23, 1904 (33 Stat., 297), which confers authority, in certain instances, to cancel first or trust patents issued on Indian allotments.

The question involved arises upon the report of the special allotting agent, Rosebud Reservation, South Dakota, who calls attention to the fact that in a number of cases allotments were made by former agents to persons as orphans while one or both of the parents were living,

the result being that such persons received double the quantity of land to which they were entitled under the act for the allotment of lands on said reservation.

The Department is controlled in this matter by said act of April 23, 1904, which limits its action, without authority from Congress, to cancel first or trust patents to three classes, as follows: Where a double allotment is erroneously made, where there is a mistake in the description of the land in the patent, and where the conditional patent is relinquished by the allottee or his heirs to take another allotment.

It appears that in many instances the allottees on the Rosebud Reservation have declined to relinquish their trust patents and select only the quantity of land to which they are entitled. Hence, it is said to be impossible for your office to proceed further, unless authority already exists or is procured from Congress to correct the errors. The belief is expressed by your office that the act of April 23, 1904, is in terms broad enough to warrant the Department in treating the allotments in question as double allotments or as errors in description.

Prior to January 26, 1895, the ruling of the Department was, that no authority existed for the correction of mistakes in Indian allotments after the issuance of the first or trust patent. On that date Congress passed an act (28 Stat., 641), authorizing the Department to correct errors in allotments and trust patents to Indians. In view of that act, the Department prior to the act of April 23, 1904, had on September 25, 1900, in the case of Lizzie Bergen (30 L. D., 258), laid down the rule:

The issuance of a first or trust patent on an Indian allotment does not terminate the jurisdiction of the Secretary of the Interior over the lands covered thereby as public lands, but until the issuance of the second or final patent he has authority, after due notice to all parties in interest, to investigate and determine as to the legality of any Indian allotment and to cancel such first or trust patent based upon an allotment erroneously allowed.

The act of 1904 was evidently passed to forestall this ruling, since which time the Department has had no latitude in the correction of errors occurring in the issuance of first or trust patents outside of the classes specifically named in the act. Unless the case comes clearly within one or the other of these classes, no authority exists aside from action by Congress to correct errors that may have been made in said patents. By a double allotment is understood the allotment of two different tracts in the name of one and the same person, or two different tracts in different names for the benefit of one and the same person. The lands involved in the allotments in question constituted but one allotment and were not double allotments in either of the above senses, nor was the mistake in said allotments a mistake of

description of the lands inserted in the trust patents within the meaning of the act of April 23, 1904. You are accordingly advised that the act is not sufficiently broad to cover these cases, but that they are, perhaps, proper ones for submission to Congress under said act.

**INDIAN ALLOTMENT—TRUST PATENT—SURRENDER OF FIRST AND
ISSUANCE OF SECOND PATENT—TRUST PERIOD.**

INSTRUCTIONS.

Where the first or trust patent issued upon an Indian allotment under the act of February 8, 1887, is surrendered for cancellation and the allottee selects other land upon which a new trust patent issues, the trust period will run from the date of the original and not from the date of the new trust patent.

First Assistant Secretary Pierce to the Commissioner of Indian Affairs, April 13, 1910. (O. L.) (C. J. G.)

The Department has received your letter of March 25, 1910, on the question as to the date from which the trust period should run where new trust patent is issued upon exchange of lands by an Indian allottee under the act of February 8, 1887 (24 Stat., 388).

An Indian to whom first or trust patent issues for a period of twenty-five years is permitted, upon proper showing, to surrender such patent for cancellation and to select other land on which he is to receive new trust patent. The practice appears to be in issuing the new patent under a new date to make no reference to the original trust patent. The effect of this is, if the trust period be calculated from the date of issuing new patent, to extend the trust period beyond the twenty-five years prescribed in the original patent.

The Department, on February 16, 1910 (38 L. D., 559), advised the General Land Office, in respect to allotments on the Klamath Reservation, that the trust period prescribed in trust patents issued on allotments under the act of February 8, 1887, begins to run from the date of such patents. The question involved there, however, had reference to original trust patents in the issuance of which there had been delay. Every intendment of the act providing for issuance of first or trust patent is, that the trust period begins to run from the date of such patent. But in the case of a change of an allotment from one tract to another the transaction is more in the nature of a change of description merely, and should not be treated in the nature of an original transaction. Hence, in such case, the trust period should not be calculated from date of the new trust patent.

In cases of this kind the new trust patent should recite the fact of exchange and the trust period should run from date of the original trust patent.

INDIAN ALLOTMENTS—TRUST PATENT—BEGINNING OF TRUST PERIOD.

KLAMATH ALLOTMENTS.

The trust period prescribed in trust patents issued on allotments under the act of February 8, 1887, begins to run from the date of the patent.

An allotment is not "made" within the meaning of the last paragraph of the act of May 8, 1906, until the issuance of first or trust patent thereon.

First Assistant Secretary Pierce to the Commissioner of the General
(O. L.) *Land Office, February 16, 1910.* (C. J. G.)

December 11, 1909, the Department approved and referred to your office, for issuance of trust patents, a revised schedule forwarded by the Indian Office of allotments numbered 1 to 951, inclusive, made to Indians on the Klamath Reservation in Oregon.

On June 20, 1900, the Department approved a schedule of allotments to said Indians, numbered 1 to 1179, to which was subsequently added allotment number 1180, and referred said schedule to your office for issuance of trust patents. It was directed that said patents issue in form and of the legal effect prescribed by section 5 of the act of February 8, 1887 (24 Stat., 388). Your office found that the descriptions of many of the allotments did not conform to the public surveys, and therefore that patents could not issue thereon. The schedule was returned to the Indian Office in order that the necessary corrections might be made.

Owing to the long time that had elapsed and to doubt as to when the corrections in the descriptions of some of the allotments could be made, the Indian Office concluded that it would be inadvisable to longer delay issuance of patents in cases where it could be properly done. Hence, that office on December 11, 1909, submitted a revised schedule of allotments numbered from 1 to 951, inclusive, and recommended that trust patents issue in the form and of the legal effect as provided in the approval of June 20, 1900.

Section 5 of the act of February 8, 1887, in accordance with provisions of which your office was directed to issue patents on the schedule referred there June 20, 1900, provided:

That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located. . . . *Provided*; That the President of the United States may in any case in his discretion extend the period.

Section 6 of the same act provided:

That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, is hereby declared to be a citizen of the United States.

The foregoing section 6 was amended by the act of May 8, 1906 (34 Stat., 182), which reads in part as follows:

That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside. . . . And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this act, or under any law or treaty . . . is hereby declared to be a citizen of the United States. . . . *Provided further*, That until the issuance of fee simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States. . . .

That hereafter when an allotment of land is made to any Indian, and any such Indian dies before the expiration of the trust period, said allotment shall be canceled and the land shall revert to the United States, and the Secretary of the Interior shall ascertain the legal heirs of such Indian, and shall cause to be issued to said heirs and in their names, a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers, and pay the net proceeds to the heirs, or their legal representatives, of such deceased Indian. The action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final.

The act of May 29, 1908 (35 Stat., 444), re-enacts substantially the last paragraph of the act of May 8, 1906, in respect to deceased allottees, except that it is operative upon allotments made either before or after its passage.

A form of trust patent was prepared in accordance with the provisions of the last paragraph of the act of May 8, 1906, which has since been in use. That is, instead of declaring that in the case of the death of the allottee the United States will hold the land allotted for the period of twenty-five years in trust for the sole use of his heirs "according to the laws of the State or Territory where such land is located," as did the old form of trust patent under section 5 of the act of 1887, the new form of trust patent under the act of 1906 reads: "but in the event said Indian does die before the expiration of said trust period the Secretary of the Interior shall ascertain the legal heirs of said Indian and either issue to them in their name a

patent in fee for said land, or cause said land to be sold for the benefit of said heirs as provided by law."

The question has now been presented, in connection with the issuance of trust patents on the revised schedule of allotments on Klamath Reservation, as to which form of patent should be used, the act of May 8, 1906, having been passed since the original schedule of said allotments was referred to your office and returned to the Indian Office for correction. The departmental approval and reference of December 11, 1909, were for the issuance of such patents in the form prescribed by the act of 1887.

It will be observed that while the act of May 8, 1906, in terms amends section 6 of the act of 1887, it in fact refers to section 5 of said act, and in its last paragraph provides a different mode for ascertaining the heirs of deceased allottees from that provided for in said section 5. The last paragraph of the act of 1906, however, is only applicable to allotments made *after* its passage. So that, in ascertaining as to which form of trust patent should be used in case of the allotments involved in the schedule approved and referred to your office December 11, 1909, it becomes necessary to determine when said allotments are to be considered as *made*—whether upon their completion and approval, or upon the issuance of trust patents.

The language of section 5 of the act of 1887 is "that upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted," etc. Here, clearly no trust is declared until actual issuance of patent, and the use of a word of the present tense, "does," shows that the trust period begins to run only upon such issuance. The form of patent both under the acts of 1887 and 1906 reads: "and hereby declares that it does and will hold the land thus allotted," etc. This same idea is further expressed in section 6 of the act of 1887, according citizenship to the allottee, which citizenship is not accorded until after issuance of patent, as shown by the following language: "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been *made* shall have the benefit of and be subject to the laws . . . and every Indian born within the territorial limits of the United States to whom allotments shall have been *made* under the provisions of this act . . . is hereby declared to be a citizen of the United States." Under the act of 1906 the allottee is accorded citizenship only upon the expiration of the trust period and issuance of patent in fee at any time the Secretary of the Interior may be satisfied of the competency of the

allottee. Provision is also made in said act, as well as in the act of May 29, 1908, for issuance of patents in fee to the heirs of deceased allottees or their lands may be sold and patent issued to the purchasers. It thus follows that by ruling that an allotment is *made* only upon issuance of trust patent, and that the trust period begins to run only from that date, the allottee or his heirs, may, nevertheless, curtail that period by securing patent in fee. While the act of 1906 does not in terms prescribe the form of trust patent, as does section 5 of the act of 1887, yet the logical and inevitable conclusion is that it was intended by Congress that the provisions of the act of 1906, in respect to the lands of deceased allottees, should supersede those of section 5 in cases where the allotment was made after the said act of 1906. As allotments have not as yet been *made* to the Indians on the Klamath Reservation whose names appear on the schedule in question, in the sense that trust patents have not as yet been issued to them, it follows that the provision of the act of 1906 is applicable.

On June 26, 1909, the Department rendered decision in the matter of disposal of the residue lands of the Omaha Indians in Nebraska under the special acts of August 7, 1882 (22 Stat., 341), and March 3, 1893 (27 Stat., 612, 630). The first named act provided, after individual allotments were completed and trust patents issued thereon, for issuance of trust patent to the tribe covering the residue lands in the same form prescribed by section 5 of the general act of 1887. Allotments were to be made from such residue lands "to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust by the United States, in quantity and upon the same conditions, restrictions, and limitations as are provided in section six of this act touching patents to allottees therein mentioned. But such conditions, restrictions, and limitations shall not extend beyond the expiration of the time expressed in the patent herein issued to the tribe in common." The trust patent was not issued to the tribe at the time it was due, but it was nevertheless held in said decision that the trust period expired twenty-five years from the date on which such patent became due. That was because it appeared from the terms of said acts that such clearly was the intention thereof and necessarily followed therefrom, as any other view necessarily affected the rights of afterborn children. That case is clearly distinguishable from the matter now under consideration.

In accordance with the foregoing views, the approval under date of December 11, 1909, of the revised schedule of 951 allotments to Indians on Klamath Reservation, is hereby modified, and trust patents will issue thereon in the form and of the legal effect as provided under the act of May 8, 1906.

CONTEST—ABANDONMENT—MILITARY SERVICE—CONSTRUCTIVE RESIDENCE.**McKEEN v. JOHNSON.**

Rejection of the commutation proof offered by a homestead entryman does not necessarily, in the absence of an adverse claim and where sufficient time remains within which the entryman may comply with law and submit new proof, result in cancellation of the entry; and the fact that commutation proof was rejected by the local officers and the General Land Office and is pending before the Department on appeal is not, in such case, sufficient reason for refusing to accept a contest against the entry based upon a charge which if proven would necessitate cancellation of the entry. In a contest against a homestead entry on the ground of abandonment it is not necessary, under the act of June 16, 1898, to either allege or prove that the entryman's absence was not due to military service, where the United States was not engaged in war during the period of abandonment. Credit for constructive residence during absence on account of official employment can not be allowed where actual residence has never in good faith been established.

First Assistant Secretary Pierce to the Commissioner of the General (F. W. C.) Land Office, April 14, 1910. (G. C. R.)

Linus Johnson has appealed from your office decision of November 26, 1909, which affirms the action of the register and receiver, holding for cancellation his homestead entry No. 1764, made March 26, 1907, for the N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 25, T. 153 N., R. 95 W., Williston, North Dakota.

The action resulted from a contest filed January 26, 1909, by Edward McKeen alleging abandonment for more than one year, failure to establish a *bona fide* residence on the land and failure to improve the same as required by law, etc.

It is contended in the appeal:

1. That the contest should not have been allowed because the entryman's final proof had been rejected by the register and receiver and your office, from which latter action he had appealed before the contest herein was filed.

2. That the contest affidavit was fatally defective in failing to allege that abandonment was not due to military or naval service.

3. That claimant's absence from the land was due to performing the duties of postmaster, to which position he had been regularly appointed after entry.

It is true claimant's commutation proof had been rejected, and properly so, by your office before contest was filed. Such action would not, however, in absence of an adverse claim, necessarily result in cancellation. The proof having been submitted fifteen months after entry, claimant had sufficient time thereafter to establish residence on land, and, by complying with the homestead law, might have made satisfactory final proof.

The contest affidavit, however, alleged a cause—abandonment for nearly two years—which, if proven, required cancellation. The con-

test could not, therefore, be properly objected to because of the prior proceedings on the proof.

Claimant's own testimony shows that he was postmaster at Nansen, North Dakota, and acted as such from about date of entry until the hearing herein, May 13, 1909. This is sufficient proof even if same was required to show that alleged abandonment was not due to military or naval service. Besides, it was not necessary either to allege or prove non-military or naval service in aid of the charge of abandonment—the time of the alleged absence being in 1907 and 1908 when there was no war in which the United States was engaged. *Biesanz v. Jacobson* (38 L. D., 317).

The testimony shows that claimant visited the land but one time before he was appointed postmaster. He stayed all night in a small house, 8 x 10 feet, as he described in his final proof. He took nothing with him to the land, but used such articles as were left there by a former occupant. His real home, prior thereto, then, and thereafter, was at Nansen, where he owned a farm. He also kept a store there. The improvements he caused to be made on the land were of the most meagre character.

The Department is of opinion that your office and the local office were right in finding and holding that he never established residence on the land before appointment to said office.

It follows that he is not justified in claiming constructive residence on the land—the only kind of residence he claims.

The action appealed from is affirmed.

REPAYMENT—REJECTION OF TIMBER AND STONE PROOF—SECTION 1, ACT OF MARCH 26, 1908.

MARGARET E. SCULLY.

Where the proof submitted on a timber and stone claim is challenged by the land department and the claimant notified that unless he applies for a hearing his claim will be rejected, and to avoid the expense of a hearing he relinquishes the claim and applies for return of the purchase money, repayment may be allowed under section 1 of the act of March 26, 1908, in the absence of fraud or bad faith, the action of the land department amounting to a rejection of the proof within the meaning of that section.

First Assistant Secretary Pierce to the Commissioner of the General Land Office, April 14, 1910. (J. H. T.)
(O. L.)

Margaret E. Scully has appealed from your decision of July 14, 1909, denying her application for the return of the purchase money paid under timber and stone sworn statement 0560, filed July 3, 1905, for the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 21, and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 28, T. 29 N., R. 1 W., Lewiston, Idaho, land district.

In her application to make timber and stone entry, Miss Scully made the usual averment that the land was most valuable for its

timber, and in her proof, which was submitted August 27, 1906, she stated that the land was steep and rocky and covered with timber, and contained about 400,000 feet of saw timber besides timber valuable for fencing, fuel, etc., and that she expected to hold the land as an investment.

The proof was suspended by the local officers and re-referred to a special agent for investigation. A special agent made an adverse report, charging that the land was not properly subject to entry under the timber and stone act, as there was no timber or stone of merchantable value on the land, and that the same was chiefly valuable for agricultural and grazing purposes. The claimant was notified of these charges by a letter of the local land office dated September 4, 1908. She was afforded opportunity to make answer to the charges, and for a hearing in defense of her claim, and was further notified that if she failed to apply for a hearing the claim would be rejected and the record thereof canceled. Under date of October 17, 1908, she executed an affidavit wherein certain statements were made urging that her application was made in good faith and that the land was subject to such entry, and further stated as to the character of the land that—

the growth is young but of such character that what cannot be sawed can all be disposed of at a very fair price for telephone and telegraph poles, railroad ties, fence rails, building timber and wood. I am informed the special agent stated that the Department attaches no value to this class of timber, and that in making his examination and report he considered only saw timber to have a value.

She also called attention to the fact that she had been subjected to the expense of two advertisements and to the further expense of traveling over 150 miles to make proof, besides paying \$400 for the land, and had been called upon either to relinquish or incur the expense of a hearing; that she was a school teacher and had a widowed mother to support; that while she believes the land subject to timber entry she was unable through misfortune to bear the further expense of a hearing, and that if the proof could not be accepted, she desired to relinquish the land and obtain repayment of the money.

Under date of May 5, 1909, claimant executed formal relinquishment and application for repayment of the purchase money. The chief of field division transmitted the relinquishment to the local officers, recommending that the purchase money be repaid, as he believed that Miss Scully had acted in good faith. The local officers made a like recommendation. You also stated in your decision that—

while it is reasonably clear that there was no fraud or attempted fraud in this case, and repayment might not be barred on that account, the claim was not *rejected*, all rights thereunder having been voluntarily relinquished before you had an opportunity to pass upon its merits.

You therefore held that repayment could not be allowed under section 1 of the act of March 26, 1908 (35 Stat., 48), or under any other provision of law. The said section referred to reads as follows:

That where purchase moneys and commissions paid under any public land law have been or shall hereafter be covered into the Treasury of the United States under any application to make any filing, location, selection, entry, or proof, such purchase moneys and commissions shall be repaid to the person who made such application, entry, or proof, or to his legal representatives, in all cases where such application, entry or proof has been or shall hereafter be rejected, and neither such applicant nor his legal representatives shall have been guilty of any fraud or attempted fraud in connection with such application.

To all intents and purposes and within the meaning of the repayment act the proof was rejected. It was not accepted, but on the contrary was challenged. Claimant was notified that if she did not apply for a hearing the proof would be rejected. She made it clear in response to that notice that she did not desire a hearing because of the expense involved, and stated that if the proof could not be accepted she desired to relinquish and secure return of the purchase money. Under the regulations (36 L. D., 112), this made up a proper case for rejection because waiver of hearing rendered it unnecessary for the Government to submit proof in support of the charges, and they stood as if admitted. Nothing further was necessary but the formal rejection of the proof. This formal act was not performed until after she had filed the formal relinquishment and the formal application for repayment. Your decision adheres closely to technical form and ignores the real effect and actual substance of the situation. The Department is of the view that this case has the status of rejected proof, and in view of the concurring finding of good faith and absence of actual or attempted fraud, repayment will be granted.

Your decision is accordingly reversed and the papers transmitted herewith for action in accordance with this decision.

NATIONAL FOREST HOMESTEAD—QUALIFICATION—ACTS OF AUGUST 30, 1890, AND JUNE 11, 1906.

WILLIAM P. WALL.

One who since the act of August 30, 1890, has acquired title to 320 acres in the aggregate under the agricultural public land laws is disqualified to make entry in a national forest under section 2 of the act of June 11, 1906.

First Assistant Secretary Pierce to the Commissioner of the General
(O. L.) *Land Office, April 14, 1910.* (C. J. G.)

An appeal has been filed by William P. Wall from the decision of your office of November 16, 1909, which affirmed the action of the local officers in rejecting his application to make homestead entry,

under section 2 of the act of June 11, 1906 (34 Stat., 233), for a tract of unsurveyed land which, when surveyed, will probably be within sections 20 and 21, T. 3 N., R. 5 W., M. M., Helena, Montana. That section provides:

That settlers upon lands chiefly valuable for agriculture within forest reserves on January 1, 1906, who have already exercised or lost their homestead privilege, but are otherwise competent to enter lands under the homestead laws, are hereby granted an additional homestead right of entry for the purposes of this act only, and such settlers must otherwise comply with the provisions of the homestead law, and in addition thereto must pay \$2.50 per acre for lands entered under the provisions of this section, such payment to be made at the time of making final proof on such lands.

The land applied for is within the Deer Lodge National Forest and in his homestead affidavit Wall alleged settlement on said land May 18, 1904. He also stated, and the records of your office show, that he made desert-land entry for 160 acres in section 20, T. 32 N., R. 23 E., upon which patent issued April 6, 1898, and homestead entry for 160 acres in section 13, T. 32 N., R. 22 E., upon which patent issued December 30, 1899. Wall further stated in his homestead affidavit that he was not the proprietor of more than 160 acres, and it appears that he sold the land embraced in his desert-land and homestead entries after acquiring title.

The basis for the rejection of Wall's application is that he is disqualified under the act of August 30, 1890 (26 Stat., 371, 391), to make homestead entry under the act of June 11, 1906, he having since said date of August 30, 1890, acquired title to 320 acres as stated, and this regardless of the fact that he has disposed of said lands. Your office holds that the act of June 11, 1906, does not operate as a repeal of the act of August 30, 1890, which provides:

No person who shall after the passage of this act, enter upon any of the public lands with a view to occupation, entry or settlement under any of the land laws shall be permitted to acquire title to more than 320 acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry or settlement is validated by this act.

In the appeal here it is urged that it was error to view the additional homestead right given by the act of June 11, 1906, apart from or other than the original homestead right of appellant; to limit the use or purpose of said act and section 2 thereof by the act of August 30, 1890; to hold that the act of August 30, 1890, was not repealed by the act of June 11, 1906, in so far as it attempted to limit the right of a settler upon a forest reservation.

The act of August 30, 1890, was construed in departmental instructions of December 29, 1890 (12 L. D., 81), to extend to *all* of the land laws and held to restrict the applicant to enter public lands of what-

ever kind or description, agricultural, coal, mineral, or lands subject to private entry, based solely upon rights acquired subsequently to the passage of said act, to 320 acres in the aggregate; but the act was explained or construed in section 17 of the act of March 3, 1891 (26 Stat., 1095, 1101), as follows:

The provision of "an act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1891, and for other purposes," which reads as follows, viz: "No person who shall after the passage of this act enter upon any of the public lands with a view to occupation, entry or settlement under any of the land laws shall be permitted to acquire title to more than 320 acres in the aggregate under all said laws," shall be construed to include in the maximum amount of lands the title to which is permitted to be acquired by one person only agricultural lands and not to include lands entered or sought to be entered under the mineral land laws.

This was tantamount to declaring that the provision in the act of August 30, 1890, limiting the amount of land to which title may be acquired under the land laws by any one person to 320 acres in the aggregate, applies to all lands acquired under any of the land laws except those relating to mineral lands. However, in the case of *W. R. Harrison* (19 L. D., 299), in which decision was rendered October 12, 1894, it was held that an entry of land valuable only for the timber and stone thereon should not be included in the maximum amount of lands that may be acquired under the limitation imposed by the act of August 30, 1890, as construed by said act of March 3, 1891. That ruling was on the theory that agricultural lands are not subject to entry under the timber and stone act, and therefore such an entry should not be included in the maximum amount of agricultural lands that could be acquired by any one person under the act of August 30, 1890. But the *Harrison* case was overruled in instructions to your office of May 4, 1905 (33 L. D., 539), and the ruling has since been in force that timber and stone entries should be included in the maximum amount of land allowed under the act of August 30, 1890, it being stated in said instructions:

Upon consideration of the whole subject, the history of the legislation, the evil sought to be remedied and the remedy applied, and studying the matter in the light of well-defined rules of construction, the Department is now of the opinion that the purpose of Congress in the cited legislation was to apply the rule of limitation to lands disposed of under any of the land laws, other than those acquired under the mineral land laws; and in expressing its conclusion used the words "agricultural lands" only in contradistinction to mineral lands.

Based on these instructions the local officers were, on May 27, 1905 (33 L. D., 605), instructed:

First. That all persons who hereafter seek title to any of the nonmineral public lands of the United States should be required to file said affidavit (Form 4-102b) with their respective applications to enter, purchase or locate (see instructions of June 29, 1905, 33 L. D., 606), and no application for lands of that character should hereafter be either received or allowed, unless it is supported by such affidavit.

The foregoing was amended in instructions of June 29, 1905 (33 L. D., 606), by eliminating therefrom the words "purchase or locate."

In the case of Charles H. Boyle (20 L. D., 255), it was held that the acreage that may be purchased by any one person at a public sale of isolated tracts is not limited in amount by the provisions of the acts of August 30, 1890, and March 3, 1891. This was because the terms "entered upon," "entry," and "made entry," having distinct meanings in the administration of the land laws, the purchaser at public sale of an isolated tract does not "enter upon" the tract he thus purchases. See also case of Isham R. Darnell (21 L. D., 454).

In the case of John W. Clarkson (31 L. D., 399), it was held that the act of August 30, 1890, does not apply to the location of military bounty land warrants held by assignment, and this for the reason that a general act should not be construed to deprive persons of rights under special legislation. Neither does the act apply to a soldiers' additional right, Kiehlbauch *et al. v. Simero* (32 L. D., 418); nor to private cash entries, Lester B. Elwood (34 L. D., 242), which followed the principle controlling the case of John W. Clarkson, *supra*, and wherein it was said, referring to the act of August 30, 1890:

That act has been construed by the seventeenth section of the act of March 3, 1891 (26 Stat., 1095), to refer to agricultural lands and not lands entered under the mineral law, but it is evident that the act of August 30, 1890, and the explanatory act of March 3, 1891, had reference to lands under the general land laws that limit the quantity that may be taken under one entry and not to purchasers at private cash entries under laws that contain no restriction whatever as to quantity.

On the contrary, it was held in the case of Matthew Crocker (33 L. D., 370), that an application to purchase land under section 3 of the act of September 29, 1890 (26 Stat., 496), should be taken into consideration as coming within the limitation contained in the act of August 30, 1890, as such an application is evidently made with a view to "occupation, entry or settlement" under the land laws within the purview of said act.

In instructions of January 18, 1904 (32 L. D., 400), the affidavit theretofore required to be made of homestead applicants was amended so as to state that since August 30, 1890: "I have not acquired title to, nor am I now claiming under any of the agricultural public land laws, an amount of land which, together with the land now applied for will exceed in the aggregate 320 acres." This was embodied in General Land Office circular of January 25, 1904, page 79.

In the case of Stuart *v. Burke* (32 L. D., 646), which involved a desert-land entry, it was held that the restriction or limitation in the act of August 30, 1890, applies only to "acquisition of title" and not to the amount of land that may be "entered or filed upon" under

the agricultural public land laws. See also cases of Mabelle L. Meserve (33 L. D., 580) and Trentham v. Copenhaver (38 L. D., 310).

Paragraph 8 of the regulations of November 30, 1908 (37 L. D., 289), under the timber and stone law, limits entry under said law to a person who "has not already acquired title to or is not claiming under the homestead or desert-land laws through settlement or entry made since August 30, 1890, any other lands which, with the land he applies for, will aggregate more than 320 acres."

The regulations of November 30, 1908 (37 L. D., 312), under the desert-land laws, prescribed in section 5 thereof:

Moreover, by the act of August 30, 1890 (36 Stat., 391), no person is permitted to acquire title under all the agricultural land laws, to more than 320 acres; therefore, if a person has, since August 30, 1890, acquired, under any of the laws except the mineral laws, 320 acres, or is at the date of his application claiming 320 acres under said laws, he is not authorized to make a desert-land entry for any quantity whatever.

In paragraph 7 of instructions of December 14, 1909 (38 L. D., 361), under the enlarged homestead act of February 19, 1909 (35 Stat., 639), it is set out:

A person who has, since August 30, 1890, entered and acquired title to 320 acres of land under the agricultural-land laws (which is construed to mean the timber and stone, desert-land, and homestead laws), is not entitled to make entry under this act; neither is a person who has acquired title to 160 acres under the general homestead law entitled to make another homestead entry under this act, unless he comes within the provisions of section 3 of the act providing for additional entries of contiguous lands, or unless entitled to the benefit of section 2 of the act of June 5, 1900 (31 Stat., 267), or section 2 of the act of May 22, 1902 (32 Stat., 203).

It is thus shown that the limitation of acreage prescribed in the act of August 30, 1890, has been applied to entries under all of the land laws, except those relating to mineral lands, where the lands were taken with a view to occupation, entry or settlement under said laws. The evil intended to be remedied by said act was the acquisition of title to various tracts of 160 acres each under the laws that one person could theretofore acquire. The act was not made retroactive, but the maximum that any one person could take in the future was not more than 320 acres. The history of legislation shows that wherever there has been a departure from the ordinary limitation in the matter of acreage any increase has been authorized by some specific provision of law.

To entitle one to the provisions of the act of June 11, 1906, he must have been a settler within a forest reserve on January 1, 1906. The act provides for two classes, those who have already exercised the homestead privilege and those who have already lost the homestead privilege. In addition, it must be shown that applicants are other-

wise competent to enter lands under the homestead laws. Prior to his settlement upon the land in question, Wall had acquired title to 160 acres under the homestead law, and if this were all, he would be entitled to make entry under the act of June 11, 1906; but in addition to exercising the homestead privilege he also entered and completed title to 160 acres under the desert-land law, and on that account is not "otherwise competent to enter lands under the homestead laws," in view of the act of August 30, 1890, which provides that no person shall, after the passage of said act, be permitted to acquire title to more than 320 acres in the aggregate, under all of the land laws. Whether said act be regarded as a homestead law or not, as suggested by the appeal, is immaterial, in that it limits the amount of land that may be acquired by any one person to 320 acres under all of the land laws. The fact that Wall sold the lands covered by his homestead and desert-land entries does not alter the fact that he acquired title under the land laws to 320 acres. The act of June 11, 1906, does not expressly repeal the act of August 30, 1890, and repeals by implication merely are not favored.

As no exception has been made of the limitation contained in said act when applied to entries made under the timber and stone, desert-land, enlarged homestead, and other acts, no good reason appears for making an exception in the case of lands subject to disposal under the act of June 11, 1906.

The decision of your office herein is affirmed.

SETTLEMENT-ENTRY-CHIPPEWA LANDS.

MCCAW *v.* SORVARI.

Under that portion of the instructions of July 23, 1908, governing the opening of certain Chippewa lands, which forbids intending settlers and entrymen to go upon the lands prior to the hour of opening, one who passes over a portion of such lands prior to the hour fixed, in order to take a position upon a tract held in private ownership within the area to be opened, with a view to thereby acquire a point of vantage from which to make settlement, and makes settlement therefrom immediately after the hour of opening, does not thereby acquire any right as against another who was standing in line at the local office and made entry for the same tract shortly after the hour of opening.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, April 16, 1910.* (E. L. C.)

Alex Sorvari has appealed from your office decision of November 20, 1909, in which you affirm the action of the local officers and hold for cancellation his homestead entry 01295, made September 15, 1908,

for lots 3 and 4, and the S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 1, T. 50 N., R. 19 W., Duluth, Minnesota, land district.

The tract in question is a part of the ceded Chippewa lands opened to settlement at 9 o'clock A. M., September 15, 1908, under the acts of June 27, 1902 (32 Stat., 400), and May 23, 1908 (35 Stat., 268). On that day at 9.30 the defendant made his entry at the local office and on November 14, following, the plaintiff applied to enter the same land, alleging prior settlement. Hearing was ordered to determine the respective rights of the parties, at which both appeared in person and by counsel and submitted testimony. The facts as disclosed by the record are substantially as follows:

On the morning of the 15th of September the plaintiff, in company with certain other parties, left the town of Brockton, which is about $7\frac{1}{2}$ miles from the land, and walked to section one. They entered the section near the northeast corner thereof, then proceeded south until they struck the quarter stake on the east line of said section; from there they proceeded west to the center stake of said section, arriving there about twenty minutes of 9 A. M. At thirty seconds after nine o'clock plaintiff stepped on to his land. The NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ was owned by one Stevens, and it was from this land that entry was made by plaintiff upon the land involved. Immediately after making settlement plaintiff proceeded to erect a cabin thereon and has since maintained his residence upon said tract. The defendant on the morning of the 15th of September, 1908, was standing in line at the door of the local land office where he had been for more than three weeks previous, but did not get his filing on the land until 9.30.

The foregoing facts which are clearly established by the testimony, show conclusively that McCaw's settlement was made prior to Sorvari's entry. The only other question presented for the consideration of the Department is as to whether or not the plaintiff, McCaw, was disqualified to enter said land by reason of his having entered upon ceded lands covered by the departmental instructions of July 23, 1908, prior to the hour of opening.

All of section 1, T. 50 N., R. 19 W., except the N. $\frac{1}{2}$ SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, was included in the schedule of July 23, 1908. The instructions of July 23, 1908 (37 L. D., 61), provide as follows:

All persons who go upon any of the lands . . . with a view to settlement thereon, prior to the hour the lands are formally opened to settlement and entry, will be considered and dealt with as trespassers, and preference will be given the prior legal applicant, notwithstanding such unlawful settlement.

The instructions above quoted are very similar to the statute under consideration by the Supreme Court in the case of *Smith v. Townsend* (148 U. S., 490, 498-499), wherein Justice Brewer in construing the prohibition contained in said clause, said: "The prohibition is against

entering upon 'any part of said lands' meaning thereby the whole body of lands."

The object sought by this prohibitive clause in the law and in the instructions was to give all parties an equal chance to obtain land, and to prevent one party from taking advantage of another by going upon the prohibited area prior to the time settlement could lawfully be made. While it does not appear that the plaintiff went upon the lands entered by him prior to the time the lands were opened, yet it does appear that shortly prior to the appointed hour of opening he crossed over the E. $\frac{1}{2}$ of said section for the purpose of obtaining a point of vantage from which to settle upon his land, and by so doing was able to settle upon the land before the defendant could get his entry filed. It was to prevent just such advantage as was gained by plaintiff by being present upon the land that these instructions were issued.

It is true that the plaintiff was upon private land adjoining the tract upon which he subsequently made settlement, for a few minutes prior to 9 o'clock, but this point of vantage was obtained by him by trespassing upon and following out the lines upon land included in the schedule, and expressly included in the instructions herein quoted. The case is similar in principle to the case of *Peter Reuter v. John W. Gregg*, decided May 3, 1909, by the Department (unreported). The question presented in said case was as to the disqualification of Reuter to make entry under the provisions of section 4 of the act of March 3, 1905 (33 Stat., 990), as follows:

and until said lands are opened for settlement no person shall enter upon and occupy the same, and any person violating this provision shall never be permitted to enter any of said lands or acquire any title thereto.

It appeared that prior to the time of opening, Reuter, in company with another party, walked up the railroad track about a mile, and that the right of way of said railroad crossed a corner of one of the quarters open to entry by said act; he did not leave the right of way and was not within a mile of the land he sought to enter. It was held that he had violated the provision of that portion of the act above quoted and was therefore disqualified to make entry. In the case under consideration McCaw disqualified himself to make entry of the land in question by being present upon the E. $\frac{1}{2}$ of said section 1, which was covered by the instructions of July 23, 1908, *supra*, prior to the hour of opening the same.

Your decision is accordingly reversed and the entry of Sorvari will remain intact.

RUPP v. HEIRS OF HEALEY ET AL.

Motion for review of departmental decision of April 16, 1910, 38 L. D., 387, denied by First Assistant Secretary Pierce, April 16, 1910.

INSANE ENTRYMAN—HEIRS—ACT OF JUNE 8, 1880.

HEIRS OF ANTHONY SIANKIEWICZ.

The act of June 8, 1880, is not applicable where the entryman, prior to becoming insane, failed to comply with the law in good faith, or where he is not living at the time application is made to offer proof.

First Assistant Secretary Pierce to the Commissioner of the General Land Office, April 16, 1910. (F. W. C.) (J. H. T.)

August 17, 1909 (not reported), the Department affirmed your decision of May 29, 1909, holding for cancellation homestead entry 01529, made October 19, 1896, by Anthony Siankiewicz, for the W. $\frac{1}{2}$ NE. $\frac{1}{4}$, and W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 24, T. 22 N., R. 4 E., Phoenix, Arizona, land district.

Under date of April 7, 1910, you transmitted a motion for review and for rehearing and reported that the said entry was canceled October 29, 1909, and the case closed.

After very careful consideration of the matters urged in support of the motion for review, no reason is seen for disturbing the action heretofore taken.

The entryman committed suicide May 21, 1898. A pretense of cultivation was kept up for several years in behalf of the heirs, but the Department affirmed your office in finding that the entryman had not in good faith complied with the law as to residence and cultivation prior to death, and that since his death the heirs had made merely colorable compliance as to cultivation and had not fulfilled the requirements of the law. It is now urged that if the Department should hold to its former decision that the heirs had not made sufficient compliance with law, then a rehearing be granted to permit the heirs to show that the entryman prior to his death was insane and thus entitle them to patent without performing cultivation since the claimant's death.

The question as to the entryman's sanity was not raised at the proper time, and furthermore the facts stated do not justify the conclusion that he was insane, and even if insanity were proven, the act of June 8, 1880 (21 Stat., 166), would not be effective to grant relief, for the following reasons:

1. The act is not applicable in cases where the entryman, prior to becoming insane, failed to comply with the law in good faith. The Department holds that the entryman had not complied with the law prior to his death.

2. The act can be applied only in case the entryman be living at the time application is made to offer proof. In this instance the entryman has been dead nearly ten years. In the meantime the heirs have not invoked the said act but have made a pretense of compliance with law as to cultivation.

No reason is seen for granting a rehearing and therefore the motion is denied.

INSPECTION OF SERIAL NUMBER REGISTERS IN LOCAL OFFICES.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., April 16, 1910.

REGISTERS AND RECEIVERS,

United States Land Offices.

GENTLEMEN: The following instructions are issued in response to the request of many local officers, who are in doubt as to the propriety of permitting the general public, and especially agents and attorneys, to have access to the Serial Number Register.

Departmental instructions of October 6, 1904 (33 L. D., 267), provide that applications to inspect records shall be "denied in all instances in which the orderly dispatch of public business would be materially interfered with." The access of agents, attorneys, and the public generally to the Serial Number Register would not only, in almost every instance, seriously hamper the orderly dispatch of business in your office, but is open to the further objection that it would afford the unscrupulous and litigious a complete docket of every matter pending before the land department, whether before you, this bureau, or the Secretary of the Interior.

It is believed that, in almost every instance, the status of any tract of land may be obtained by reference to the plat and tract book; and if inquiry, *by a party in interest*, be directed to any application or other matter to which a serial number has been assigned, you may, if it be compatible with the orderly dispatch of the public business, permit such party to examine the notations upon the register under such serial number, *but no other*; and such examination must be made under the observation of an officer or clerk.

Registers and receivers are required, by section 2 of the act of March 3, 1883 (22 Stat., 484), to furnish, upon application of the proper State or Territorial authorities, for taxation purposes, lists of all lands sold in their respective districts and collect therefor a fee of ten cents per entry (36 L. D., 194). If, as sometimes happens, you are unable, because of pressure of other business pertaining to the entry of public lands, to prepare such lists, a duly accredited representative of the State or Territory may have access to the "Serial Number Register" for that purpose, *provided* he first examine the "Abstract of Final Entries" and procure therefrom the list of serial numbers to be examined, which examination must be conducted under the observation of either the register, receiver, or a clerk employed under the authority of this office. If, at any time,

the privilege extended to the representative of the State or Territory be abused by inspection of other matters than that within the scope of his investigation, and, especially, by making notes of current business, you are directed to summarily refuse him further access to the "Serial Number Register" and report the matter to this office.

Inspectors will be required to report all violations, by local officers, of these instructions.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

R. A. BALLINGER, *Secretary.*

COAL LANDS—SURFACE RIGHTS—FORM 4-357 AMENDED.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 18, 1910.

REGISTERS AND RECEIVERS OF UNITED STATES LAND OFFICES, AND
SPECIAL AGENTS OF THE GENERAL LAND OFFICE.

GENTLEMEN: The circular of September 7, 1909 (38 L. D., 183), giving instructions under the act of Congress approved March 3, 1909 (35 Stat., 844), "For the Protection of Surface Rights of Entrymen," is hereby amended as follows:

In form 4-357 (38 L. D., 185), containing the notice of right of election, together with the election to receive patent upon non-mineral claim, exclusive of any deposits of coal in the land, the venue in lines 1 and 2 of the election to receive patent is hereby eliminated, as is also the phrase "being duly sworn" in line six of the reverse side of the form. The certificate of the execution of the election is eliminated, as is also "note 1" thereunder; and, in lieu thereof, the following form is prescribed:

The foregoing election was, in our presence, read to or by the said _____ who is to each of us personally known, and we, the undersigned, have this day hereunto set our hands as witnesses of the execution thereof.

Dated this _____ day of _____ 19____, at _____ State of _____.

Name _____ Residence _____.
Name _____ Residence _____.

This change in the form is made because of the fact that the act of Congress referred to does not require that the election be sworn to.

Respectfully,

FRED DENNETT,
Commissioner.

Approved:

R. A. BALLINGER, *Secretary.*

ENLARGED HOMESTEAD—ADDITIONAL ENTRY—MARRIED WOMAN.

ALICE C. ST. JOHN ET AL.

A married woman is not by reason of her marriage disqualified to make entry under section 3 of the enlarged homestead act of February 19, 1909, as additional to an entry made by her prior to her marriage.

First Assistant Secretary Pierce to the Commissioner of the General
(O. L.) *Land Office, April 18, 1910.* (C. J. G.)

An appeal has been filed by Ira C. Benson from the decision of your office of December 3, 1909, rejecting his application to make additional homestead entry under section 3 of the act of February 19, 1909 (35 Stat., 639), for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 19, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 30, T. 55 N., R. 65 W., Sundance, Wyoming, and allowing the application of Alice C. St. John for the land under said act.

The land in question was embraced in the homestead entry of Grace M. Hendricks, now Grace M. Cole, made November 11, 1907, and so remained up to May 10, 1909. On the latter date Benson filed in the local office a relinquishment of Hendricks, executed February 10, 1909, before H. H. Gunderson, United States commissioner, together with his application to enter the land under said act of February 19, 1909. On the same date, to wit, May 10, 1909, another relinquishment of Hendricks, dated March 12, 1909, and executed May 8, 1909, before the same United States commissioner, was filed in the local office, and an application by St. John to enter the land under the same act. Both relinquishments and applications were stamped as having been filed the same date and hour, to wit, May 10, 1909, at nine a. m. The register made report of the matter, November 4, 1909, as follows:

May 10th, 1909, Ira C. Benson filed in this office a relinquishment to the last named tract of land dated some time prior to date of filing, asking that he be allowed to file under act of Feb. 19, '09, additional homestead entry rejected for the following reason.

Another relinquishment was presented by some other man, whose name I did not learn, but it was not Mr. St. John the husband of the entrywoman in question, insisting that his relinquishment be accepted first and the land given to Mrs. St. John as he was in the office first.

I examined his relinquishment and found it was of much later date than the one given Mr. Benson, therefore we rejected both and told them we would send both sets of papers to the Hon. Commissioner for action.

It thus appears that Benson's application was rejected because of the claimed priority of the relinquishment and application filed by some one in behalf of St. John, while the latter's was rejected because

of the earlier date of the relinquishment presented by Benson. Your office sustained the rejection of Benson's application and directed allowance of St. John's, for the following reasons: The land was not open to entry under the act of February 19, 1909, at the time Benson procured Hendricks's relinquishment, which was filed by him May 10, 1909; it is not clear that he at that time or any time prior to making application for the land had any intention to enter the same; that for some reason, in an affidavit filed with his application, Benson seems unwilling to have it appear that he obtained the Hendricks relinquishment on the date it was executed; that in said affidavit he swore that he purchased the improvements on the land February 10, 1909, and that Mrs. Cole "was to relinquish," so that he could file on the land; that it is alleged by one of the witnesses to the relinquishment executed May 8, 1909, in behalf of Mrs. St. John, that the relinquishment executed February 10, 1909, was placed in the hands of a man who was a dealer in such papers, and that such was the situation March 7, 1909.

With the papers is an affidavit by Charles L. St. John, husband of Alice C. St. John, executed May 10, 1909, and endorsed as having been filed in the local office at nine a. m. on that date, in which he states, among other things, referring to the land covered by the Hendricks entry:

I now offer a relinquishment to the said land, and ask that the same be accepted for the reason that the same was offered at the said land office, on the 10th day of May, 1909, and was not accepted by the said land office for the reason that another relinquishment for the said land was offered at the same time by one I. D. Benson; . . . that I. D. Benson had a relinquishment to this same land once before, and he bought the same for the purpose of speculation and not for his own use.

In a corroborated affidavit filed with his application of May 10, 1909, Benson stated:

That he the said affiant did upon the 10th day of February A. D. 1909 buy all of the improvements on said land the said applicant was to relinquish so that said applicant could file on the said last above described tract of land that under the said above described relinquishment he the said applicant did go on and cultivate the said land to the extent of 30 acres of land that the same is in crop at this time that he has made this application herewith in good faith that he the said applicant did pay unto said Grace M. Hendricks the sum of two hundred dollars for the said improvements and if she would relinquish as is evidenced by letter herewith attached and is signed by the cashier of the bank at Hulett, Wyoming, who seen the said money paid over to the said Grace M. Hendricks.

In a letter dated May 8, 1909, the cashier of the Hulett, Wyoming, bank, states that he personally knows that Mrs. Hendricks received from Benson the sum of \$200 "for her relinquishment, for which we understand said party has relinquished to another party and said party has filed before H. H. Gunderson."

In an affidavit dated January 8, 1910, the cashier states that he personally knows that Benson did pay to Grace M. Hendricks's husband, A. P. Cole, \$200, and received relinquishment for the land in question.

H. H. Gunderson, the United States commissioner before whom the respective relinquishments were executed, says that during the months of April and May, 1909, Benson frequently came into his office and inquired if he could make additional homestead entry under the Mondell homestead law, indicating to him that he desired to make filing upon land adjoining his original homestead entry.

In an affidavit dated January 14, 1910, Benson states that he bought the improvements on the land in question with the understanding that he was to have a relinquishment, which he received, and intended to make an additional homestead entry under the enlarged homestead act; that he has been improving said land since purchasing said relinquishment and has under cultivation at least thirty acres, and that he has expended in labor on said land at least \$220, in addition to the \$200 paid Hendricks for the improvements thereon.

In his appeal here Benson states, under oath, among other things:

I applied at the land office a number of times to file, but was informed that I could not for some time—until they received instructions. Our local land office received instructions on May 8, 1909, to receive filing under the Mondell expansion. I was at home at work and did not know until Sunday what had been done. I then learned that this woman, Grace M. Hendricks, had gone before Herman H. Gunderson and made another relinquishment in favor of her sister, Alice Hendricks, who is now Alice St. John.

I paid \$200 for the privilege of filing and those two ladies and their husbands, together with the aid of one J. M. Cole of Hulett, Wyo., concocted a scheme to beat me out of my money and labor. This man, J. M. Cole, lived in Hulett, and he watched the land office until the opening, then he notified them the same day and they went down and made out their papers.

This was done on the 8th day of May, 1909. On May 10th, I went to the land office at Sundance, Wyo., to file. I had only presented my application, when they arrived with their application for record.

The record shows that Alice C. St. John, formerly Alice C. Hendricks, was married October 20, 1908. Her present application, of date May 10, 1909, is as additional to her homestead entry made November 11, 1907, while a single woman, for the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 19, S. $\frac{1}{2}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 30, T. 55 N., R. 65 W., upon which final proof had not been made. Prior to the register's report of November 4, 1909, and with their returns for May, 1909, the local officers transmitted said application with the statement that they had rejected same because the applicant was a married woman. Under date of July 27, 1909, your office advised said officers that the fact of the applicant's marriage subsequent to her original entry, did not of itself disqualify her to make additional entry under section 3 of the act of

February 19, 1909, *supra*, and her application was returned for action thereon accordingly. Subsequently, attention having been called to Ira C. Benson's claim, your office, on October 28, 1909, instructed the local officers not to allow either application to go of record until they were further advised.

The character of lands contemplated by the act of February 19, 1909, known as the enlarged homestead act, are such as are not "susceptible of irrigation at a reasonable cost from any known source of water supply." Section 3 of said act provides:

That any homestead entryman of land of the character herein described, upon which final proof has not been made, shall have the right to enter public lands, subject to the provisions of this act, contiguous to his former entry, which shall not, together with the original entry, exceed three hundred and twenty acres, and residence upon and cultivation of the original entry shall be deemed as residence upon and cultivation of the additional entry.

This section is remedial and is but an enlargement of an existing incomplete homestead entry. Viewed in this light, the marriage of the entrywoman does not render her incapable of availing herself of the benefits of said section.

Under all the circumstances, the Department is of opinion that a hearing is required to satisfactorily determine the issues between the parties to this controversy. The decision of your office rejecting Benson's application and awarding right of entry to Alice C. St. John is, therefore, vacated, and your office will proceed accordingly.

SELECTIONS UNDER CAREY ACT—WITHDRAWALS—ACT OF MARCH 15, 1910.

REGULATIONS.

Supplemental to regulations concerning the selection of desert lands by certain States and Territories, approved April 9, 1909 (37 L. D., 624).

By the act of March 15, 1910 (Public, No. 87), section four, act of August 18, 1894 (28 Stat., 372, 422), commonly known as the Carey Act, was amended so as to authorize the Secretary of the Interior, upon application of a beneficiary State or Territory, to temporarily withdraw from settlement or entry public lands of the United States, pending survey and investigation preliminary to the filing of application for the segregation of such lands under said act of August 18, 1894.

The text of the act is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That to aid in carrying out the purposes of section four of the act of August eighteenth, eighteen hundred and ninety-four,

entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending eighteen hundred and ninety-five, and for other purposes," it shall be lawful for the Secretary of the Interior, upon application by the proper officer of any State or Territory to which said section applies, to withdraw temporarily from settlement or entry areas embracing lands for which the State or Territory proposes to make application under said section, pending the investigation and survey preliminary to the filing of the maps and plats and application for segregation by the State or Territory: *Provided*, That if the State or Territory shall not present its application for segregation and maps and plats within one year after such temporary withdrawal the lands so withdrawn shall be restored to entry as though such withdrawal had not been made.

Approved, March 15, 1910.

REGULATIONS.

1. Under the provisions of this amendatory act, public lands of the United States may be temporarily withdrawn upon proper application by a beneficiary State or Territory that proper surveys may be prepared, and investigation made preliminary to the filing of application by such State or Territory, for the segregation of such lands under the Carey Act.

If such application is not filed within one year from the date of withdrawal, the lands so withdrawn will, as directed by the act, be immediately restored to entry.

No provision is made for the extension of such a temporary withdrawal.

2. To obtain the benefits of this amendatory act, the State or Territory, through its proper official, will be required to file in the local land office in the land district within which the lands sought to be withdrawn lie, an application therefor (see appended Form B), which shall set forth the name of the individual or corporation proposing to reclaim the lands; that all of the forms and conditions imposed by the State law upon such proposer, prior to segregation, have been complied with; that, from the showing made by the proposer (or state other source of information), it is believed that sufficient water to irrigate the whole of the lands asked to be withdrawn, over and above prior appropriations, is available, and that the proposer has either acquired title to such water, or applied for the same, and that the lands are desert in character.

Appended to the application should be a list of the lands asked to be withdrawn; if the lands are unsurveyed, the fact should be set forth, together with a statement that an application for the survey thereof has been filed in the office of the surveyor-general.

3. Accompanying such application should be filed an affidavit (see appended Form C), based upon personal examination, that the lands sought to be withdrawn are desert in character, as contemplated by the Carey Act, and are nonmineral.

This affidavit should be made either by the proposer, his or its engineer, or by the State or Territorial engineer, or one of his assistants.

4. Where the lands sought to be withdrawn are situated in more than one land district, a list must be filed in each district, describing the lands in that district.

5. Upon the filing of such application, the register will at once note the same upon his records and will thereafter reject all applications to enter, purchase or select any of such lands, excepting when settlement or application to enter, purchase or select prior to the date of filing of the States application is alleged, or disclosed of record; he will then at once transmit the application to this office for further action, first noting thereon the date of filing, over his written signature.

6. Within three months after the date of filing the application for withdrawal in the local office, the State must file a corroborated affidavit by the proposer, his or its engineer, or the State engineer, that the work of surveying and laying out the proposed irrigation system has been actually commenced in the field and is being energetically prosecuted; this affidavit should show the work accomplished and the result.

In default of such showing by the State, the withdrawal will be promptly revoked.

7. In the event that any of the tracts withdrawn are found to be above the proposed irrigation works, or for any other reason not susceptible of irrigation, the fact and description of the non-reclaimable land by smallest legal subdivisions should be at once communicated to this office, that they may be relieved from the withdrawal.

8. If at any time after withdrawal it is shown that the State is not energetically prosecuting the investigation and survey of the lands, that the same are not reclaimable by the proposed system of reclamation, are not desert in character, or for any reason are not subject to the provisions of the Carey Act, or that the proposer is not proceeding in good faith, the withdrawal will be at once revoked.

9. The one year mentioned in the act as the period of withdrawal will commence to run from the date of the filing of the application for withdrawal in the local land office.

FORM B.

STATE OF _____,
UNITED STATES LAND OFFICE,
_____, _____, 19__.

_____, the duly authorized agent of the State of _____, under and by virtue of an act of Congress approved August 18, 1894 (28 Stat., 372, 422), and the acts amendatory thereof, and in pursuance of the rules and regulations

prescribed by the Secretary of the Interior, hereby makes and files the following list of desert public lands which the State is authorized to select under the provisions of the said acts of Congress, as an application for the temporary withdrawal of such lands under the provisions of the amendatory act of March 15, 1910 (Public, No. 87), preliminary to the survey and investigation thereof, with a view to their selection under said act of August 18, 1894, and I hereby certify that this application is made at the instance of _____ who (which) has filed with the State Land Board (or other proper official or body) a proposition to reclaim such of the lands included in said list as may be found susceptible of irrigation and reclamation; that said proposer has complied with all of the forms and conditions imposed by the laws of the State of _____ upon such proposer prior to segregation; that from the showing made by him (or it), and from other data at my command, I verily believe that sufficient water to irrigate the whole of the lands withdrawn, over and above prior appropriations, is available and that the proposer has acquired title to such water (or applied for or appropriated such water as the case may be), and that the lands are desert in character (if the lands are unsurveyed, state the fact, and that application for the survey thereof has been made by the State to the surveyor-general).

FORM C.

STATE OF _____,

County of _____, ss:

_____ being duly sworn, says, that he is the State (or Territorial) engineer of the State (or Territory) of _____ (if the affidavit is made by any one other than the State engineer he should be so described as to identify him with the State or the project); that the tracts described in the accompanying application under the amendatory act of March 15, 1910 (Public, No. 87), the temporary withdrawal of which is asked, pending survey and investigation preliminary to the inclusion thereof in State Segregation List No. _____, are each and every one desert land as contemplated by the act of Congress approved August 18, 1894 (28 Stat., 372, 422), the act of June 11, 1896 (29 Stat., 434), and the act of March 3, 1901 (31 Stat., 1133, 1188); that he is well acquainted with the character of the land herein applied for, having personally examined same; that there is not to his knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, nor any deposit of coal, placer, cement, gravel, salt spring, or deposit of salt, nor other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons, and that said land is essentially nonmineral land.

Sworn to before me this _____ day of _____, 19____.

[SEAL.]

_____,
Notary Public.

Certificate expires _____.

Approved, April 25, 1910:

R. A. BALLINGER,

Secretary.

ENLARGED HOMESTEAD—LANDS EMBRACED IN HOMESTEAD ENTRIES—DESIGNATION UNDER SECTION 6.**INSTRUCTIONS.**

Lands embraced in entries made under the general homestead law are, if the facts justify such action, subject to designation under section 6 of the enlarged homestead act, and entrymen will not, after such designation, be required to reside thereon.

First Assistant Secretary Pierce to the Commissioner of the General
(O. L.) *Land Office, May 3, 1910.* (S. W. W.)

The Department has considered your letter of April 4, 1910, submitting for instructions the question as to the right of the Department to designate, under section six of the enlarged homestead act of February 19, 1909 (35 Stat., 639), lands which were formerly entered under the provisions of the general homestead law.

The question is presented by Senator Smoot, who requests that the S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and N. $\frac{1}{2}$ SW. $\frac{1}{4}$ of Sec. 24, T. 6 S., R. 6 W., embraced in the homestead entry of Ephraim St. Jeor, No. 16583, made October 30, 1906, and the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and E. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 12, T. 5 S., R. 6 W., embraced in the homestead entry No. 17126 made May 21, 1908, both in the Salt Lake land district, be examined with a view to their designation under the provisions of said section six. It is stated in this connection that these lands were entered in good faith but the entrymen found it impossible to comply with the requirements of the homestead law respecting residence, because of their inability to procure water on the land.

It is stated in your letter that the lands surrounding that described above have been heretofore designated as coming within the provisions of section six of the said act; that the tracts in question were not included within the designation or classification for the reason that the agents who made the field examination were instructed not to include any lands found to be covered by entries or otherwise appropriated; that if these tracts were vacant your office would feel warranted in recommending that they be designated as falling within the provisions of section six, but in view of the fact that they were entered prior to the passage of the act you can not recommend the action desired.

It is stated as a reason for your recommendation that these tracts are not unappropriated within the meaning of section one of the act of 1909, *supra*, as it was the purpose of that act to apply only to tracts of land which were subject to entry. It is stated further that in the case of one of the entries involved there is no adjoining land, and for that reason if the tracts should be designated as falling within the sixth section of the act the entryman could not enlarge his entry.

Inasmuch as the petition in this case is but one of many which have been received by your office, the opinion of the Department is requested in order that a rule may be established for the disposition of the cases that may arise.

Section one of the act of February 19, 1909, *supra*, provides:

That any person who is a qualified entryman under the homestead laws of the United States may enter, by legal subdivisions, under the provisions of this act, in the States of Colorado, Montana, Nevada, Oregon, Utah, Washington, and Wyoming, and the Territories of Arizona and New Mexico, three hundred and twenty acres, or less, of nonmineral, nonirrigable, unreserved and unappropriated surveyed public lands which do not contain merchantable timber, located in a reasonably compact body, and not over one and a half miles in extreme length: *Provided*, That no lands shall be subject to entry under the provisions of this act until such lands shall have been designated by the Secretary of the Interior as not being, in his opinion, susceptible of successful irrigation at a reasonable cost from any known source of water supply.

Section six of the said act provides:

That whenever the Secretary of the Interior shall find that any tracts of land, in the State of Utah, subject to entry under this act, do not have upon them such a sufficient supply of water suitable for domestic purposes as would make continuous residence upon the lands possible, he may, in his discretion, designate such tracts of land, not to exceed in the aggregate two million acres, and thereafter they shall be subject to entry under this act without the necessity of residence.

It will be seen that while only unappropriated lands may be entered as provided in section one, there is no positive inhibition against the designation of lands already entered as being of the class prescribed by the act. On the contrary, section three of the act plainly provides that any homestead entryman of lands of the character described, upon which final proof has not been made, shall have the right to enter public lands subject to the provisions of this act, contiguous to his former entry, which shall not, together with the tract previously entered, exceed three hundred and twenty acres. This clearly shows that the act contemplated that lands theretofore entered might be thereafter designated by the Secretary of the Interior.

It is maintained that if these entrymen are compelled to reside upon the lands in order to acquire title, it will be necessary for them to abandon their claims, as it is impossible to secure water for domestic use. In that event, it would, of course, be competent for the Secretary of the Interior to designate the lands as falling within the provisions of the act, and they could thereafter be entered under the provisions of that act.

The matter considered, the Department sees no reason why, if the facts justify it, lands already entered may not be designated under the sixth section as well as under the other sections of the act.

However, it should be stated that the fact that lands were entered under the provisions of the general homestead law constitutes at

least some evidence that they are lands suitable for homes, and investigation and examination of such lands should therefore be made with unusual care before they are designated under the act of 1909.

ENLARGED HOMESTEAD—SECTION 6—DISCOVERY OF WATER SUBSEQUENT TO ENTRY.

WEB GREEN.

One who in good faith makes homestead entry of lands designated under section 6 of the act of February 19, 1909, as not containing a sufficient supply of water suitable for domestic purposes and therefore subject to entry free from the necessity of residence, will not be required to establish residence should a sufficient supply of water be subsequently obtained.

First Assistant Secretary Pierce to Hon. Reed Smoot, United States (O.L.) Senate, May 4, 1910. (S.W.W.)

I have received your letter of March 25, 1910, enclosing a communication addressed to you by Mr. Web Green, of Salt Lake City, requesting an opinion as to the effect of obtaining water for domestic use from wells dug on lands previously designated and entered under the provisions of section six of the act of February 19, 1909 (35 Stat., 639).

Sections one to five of the said act provide for an enlarged homestead in the States named, of lands designated by the Secretary of the Interior as not susceptible of successful irrigation at a reasonable cost from any known source of water supply, but require that an entryman shall reside upon his claim and cultivate a specified quantity of land annually. Section six of the act provides for the designation by the Secretary of the Interior of a certain quantity of lands in the State of Utah which do not have upon them a sufficient supply of water suitable for domestic purposes as would make continuous residence on the land possible, and that such lands may be entered as under the provisions of the first five sections of the act, but because of the lack of water for domestic purposes, entrymen, under the provisions of section six, are excused from residing upon the lands. They are, however, required to reside within such a distance as will enable them to successfully cultivate and improve the same.

The question presented by the correspondence is whether or not persons, who make entries under the provisions of section six and by the digging of wells succeed in securing water for domestic purposes, should thereafter be required to establish residence on the lands entered, notwithstanding the previous designation by the Secretary of the Interior of such lands as being of the character prescribed in section six of the act.

While it is believed that a designation or classification of lands under the act involved is not necessarily conclusive, nevertheless, I am of opinion that where entry is made under the provisions of section six, upon the faith and in full reliance upon the correctness of the designation of the lands as falling within the class as prescribed by law, such designation or classification should not thereafter be modified to the injury of any one who in good faith has acted upon such designation. The fact that certain entrymen have secured water upon lands so classified, would probably constitute a good reason for reexamination of the lands included within the area designated, with a view to reclassification, such reclassification, however, it would seem should be restricted to lands which have not been entered upon the faith of the former designation.

It is quite certain that it was not the intention of Congress to retard the possible development of any section of the country, and this Department will not so administer the law as to preclude entrymen from making such efforts as they may desire to secure water upon lands entered by them under this act, and to hold that the discovery of a means whereby water may be secured will necessitate a change in the character of the entry, would, unquestionably, prevent entrymen from endeavoring to secure water.

Inasmuch as these designations or classifications are made at the discretion of the Secretary of the Interior, I should not be disposed to change the classification or designation of any lands which had been entered in good faith under former designations.

SETTLEMENT CLAIM IN NATIONAL FOREST—FAILURE TO MAKE ENTRY WITHIN THREE MONTHS AFTER FILING OF THE PLAT.

WINFRED S. SCHMITZ.

In view of the fact that the proviso in the proclamation of September 20, 1906, creating the Lola national forest, excepting all lands "covered by any valid prior claim, so long as the . . . claim exists," fails to require that the settler shall file his declaration or make entry within any particular period as a condition to having the tract settled upon excepted from the operation of the withdrawal, a settlement claim will except the land covered thereby so long as the settler continues to comply with the law in the matter of residence, cultivation, and improvement, notwithstanding he may fail to make entry within three months after the filing of the township plat of survey.

First Assistant Secretary Pierce to the Commissioner of the General
(O. L.) *Land Office, May 4, 1910.* (E. F. B.)

Winfred S. Schmitz has appealed from the decision of your office of September 3, 1909, holding for cancellation his homestead entry,

made March 4, 1909, for lots 3 and 4 and E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 30, T. 13 N., R. 22 W., Missoula, Montana.

The land in question is within the limits of the Lola forest reserve, created September 20, 1906, by proclamation of the President. Claimant settled on the land in April, 1906, while it was unsurveyed. The township plat of survey was filed in the local office August 18, 1908, and the entry was not made until March 4, 1909.

May 18, 1909, the chief of 4th field division sent a report to your office on said entry but made no recommendation except that proceedings be instituted looking to the cancellation of the entry "if the fact that the claimant failed to file his homestead entry within the three months after the filing of the township plat is sufficient to warrant such proceedings."

The Proclamation creating this reservation contains the following provision:

This proclamation will not take effect upon any lands withdrawn or reserved, at this date, from settlement, entry, or other appropriation, for any purpose other than forest uses, or which may be covered by any prior valid claim, so long as the withdrawal, reservation, or claim exists.

It will be noticed that the provision usually embodied in such proclamations, excepting from the force and effect thereof all lands "upon which any valid settlement has been made, pursuant to law, and the statutory period within which to make entry or filing of record has not expired," was not used in that proclamation, but, instead thereof, it excepted all lands "covered by any valid prior claim, so long as the . . . claim exists."

It does not appear for what reason the old form of exception contained in all the proclamations from March 18, 1892, to July 18, 1906, which were substantially in the same terms, and which form has also been adopted in all proclamations from January 15, 1907, to the present time, was changed to the form above quoted and used in all withdrawals from August 8, 1906, to November 7, 1906.

But whatever the purpose, it is evident that the effect of the proclamations creating forest reservations during that period excepted from the withdrawal all lands upon which there was a valid settlement claim made prior to such withdrawal, even though the settler failed to make entry or filing of record within the statutory period.

The requirement of the statute that in all settlement claims the settler shall give notice of his claim by placing his filing or entry of record within three months from the date of his alleged settlement is for the protection of the next settler in order of time, and the failure to file such notice within such statutory period does not forfeit the claim except as against "the next settler in order of time on the same tract, who shall have given such notice and otherwise complied with the conditions of the law." *Johnson v. Towsley* (13 Wall., 72, 90).

A settler is therefore not prohibited from placing his claim of record at any time after the expiration of the statutory period, designed for the protection of other settlers upon the same land, except as against such subsequent settler, but such claim may continue to exist by virtue of the settlement although the settler may have failed to place his claim of record.

As the proclamation by which this reservation was created did not require that a settler should file his declaration or make entry within any particular period as a condition to having the tract settled upon excepted from the operation of the withdrawal, it therefore recognized such claims as existing claims so long as the settler continued to comply with the law as to residence, cultivation and improvement of the tract.

As claimant has made entry of the land, and as it is not charged that he has failed to comply with the law in any respect, save in his failure to make entry within three months from the filing of the township plats, the entry will be allowed to remain intact subject to future investigation as to whether his settlement was commenced and has continued in good faith by complying with the law as to residence, cultivation and improvement of the land. If it should appear that claimant has not complied with the law in all respects, except as to his failure to put his claim of record within the statutory period, that question may be again considered in determining whether it was a valid claim and whether his entry should be canceled.

The decision is reversed.

YUMA AND COLORADO RIVER RECLAMATION PROJECTS—ENTRY OF RESTORED LANDS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 9, 1910.

REGISTER AND RECEIVER,
Los Angeles, California.

SIRS: This office has given consideration to your letter of the 12th ultimo, in which you have requested instructions as a guide for your action on applications for lands within your district, formerly withdrawn for the Yuma and Colorado River projects, in pursuance of the act of June 17, 1902 (32 Stat., 388), which lands will be subject to entry, filing, or selection, under the public land laws, at your office on May 18, 1910, as provided by restorations of January 10, 1910.

In answer you are informed that as these lands are all surveyed a prospective desert land entryman cannot acquire a possessory or

preference right to any thereof prior to filing a declaration or oath in your office.

A settler by personally going on and improving, or establishing a residence on any of these lands not otherwise appropriated, would gain a preference right to enter the lands settled on, within three months, as against any subsequent settler, or person subsequently applying to enter them.

An application to enter any of these lands not otherwise appropriated, properly executed on or after May 18, and forwarded to your office, would be effective on the date of its receipt by you against any subsequent applicant.

If conditions prevail on May 18th rendering such action advisable, in your judgment, and with a view to the prompt and orderly dispatch of public business, you are hereby authorized to take action, in whole or in part, like that authorized by the departmental instructions to you on the methods to be employed in the opening to entry in March last of the farm units within the Yuma irrigation project under the act mentioned.

Very respectfully,

S. V. PROUDFIT,
Assistant Commissioner.

Approved:

R. A. BALLINGER,
Secretary.

CHIPPEWA AGRICULTURAL LANDS, MINNESOTA.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, May 10, 1910.

REGISTERS AND RECEIVERS,

Cass Lake, Crookston, and Duluth, Minnesota.

GENTLEMEN: 1. I inclose herewith a schedule ^a containing a description of 233,295.29 acres of Chippewa lands ceded under the act of January 14, 1889 (25 Stat., 642). The schedule includes 8 townships in the Red Lake Reservation, townships 157 and 158 N., ranges 32 to 35 W., inclusive, the plats of which will shortly be filed in your office; Garden and Oak islands, which were for a time claimed by Canadian Indians; 48,783.52 acres of "cut-over" lands, or lands from which the timber has all been cut and removed, and 1,192.05 acres of relinquished allotments in the Leech Lake Reservation, found to be agricultural.

^a[Schedule omitted.]

All lands claimed by the State as swamp have been eliminated herefrom, but the matter is not yet settled, and the State may assert a claim to such of the lands described in the list as were swamp and overflowed at the date of the act of March 12, 1860 (12 Stat., 3).

2. The lands are to be disposed of to actual settlers only, under the provisions of the homestead law, as provided in section 6 of said act of January 14, 1889, and under the laws applicable to town sites, as provided by act of February 9, 1903 (32 Stat., 820).

3. The hour of 9 a. m., June 20, 1910, has been fixed upon as the time on and after which these lands will be opened to entry.

4. Section 4 of the act of May 23, 1908, declares that the lands in the Winnibigoshish, Cass Lake, Chippewa of the Mississippi, or Leech Lake Indian reservations not included in the national forest created thereby are open to homestead settlement, and that as fast as the timber is removed from timber land on any of said reservations not included in the national forest it shall be open to homestead settlement.

Settlement on the "cut-over" lands described in the circular in the above-mentioned reservations since March 13, 1909, when they were withdrawn (37 L. D., 491), which withdrawal has been extended to the present time, will not be recognized, but preference will be given the prior legal settler from and after the date hereof.

The schedule includes lands in the Fond du Lac, Deer Creek, Pigeon River, White Earth, and Red Lake reservations. As to these lands the instructions heretofore given by the department apply, and they are not subject to settlement prior to the hour they are formally opened to entry. All persons who go upon any of the lands in said Fond du Lac, Deer Creek, Pigeon River, White Earth, and Red Lake reservations from which the timber has been cut and removed under said act of June 27, 1902, with a view to settlement thereon, prior to the hour the lands are formally opened to settlement and entry, will gain no rights thereby, and preference will be given the prior legal settler after the hour fixed for the opening, or the prior legal applicant, as the case may be, notwithstanding such unlawful settlement.

5. Notices for publication, as required by statute, have been forwarded to the newspapers in which they are to be published. You will post a copy of said notice in your office.

6. Applicants for these lands must possess the necessary qualifications required in the case of ordinary homestead entries.

7. Each settler is required, by the act of January 14, 1889, to pay for the lands settled upon the sum of \$1.25 for each acre, such payment to be made in five equal annual installments. The five annual payments must be made at the end of the first, second, third, fourth, and fifth years, respectively, from the date of the homestead entry.

8. The usual fee and commissions must be paid at the time of original entry and when the commutation or final payment and proof are made, but you will not collect any payment for lands in excess of 160 acres embraced in an entry when the original entry is allowed, as the payment for such excess area will be included in the whole amount required to be paid in installments. [See instructions of August 17, 1901 (31 L. D., 72), and September 6, 1901 (31 L. D., 106).]

9. Under section 8, of the act of May 20, 1908 (35 Stat., 169), entrymen for lands in the former Red Lake Reservation will be required to pay a drainage charge of 3 cents per acre. In all entries made for the lands you will note on the application and receipt the following: "Subject to act of May 20, 1908." (See 36 L. D., 477.)

10. A person who has heretofore made a homestead entry may make a second entry for 160 acres of these lands where the same is authorized by the laws and regulations applicable to the public lands of the United States. (See the acts of February 8, 1908 (35 Stat., 6); June 5, 1900 (31 Stat., 267); and May 22, 1902 (32 Stat., 203); and the circular of instructions of February 29, 1908.)

Additional homestead entries for so much land as, added to the quantity previously entered, shall not exceed 160 acres are provided for in the acts of March 2, 1889 (25 Stat., 854), and April 28, 1904 (33 Stat., 527). (See the circular of instructions of July 27, 1907.)

In the consideration of applications to make second and additional homestead entries for these lands you will be governed by said instructions.

12. The right of commutation under section 2301, Revised Statutes, is extended to these ceded Chippewa lands by the act of March 3, 1905 (33 Stat., 1005); and in case of commutation you will require the entryman to pay the final homestead commissions in addition to the purchase price of the land, \$1.25 per acre. (See 33 L. D., 551.)

13. The disposal of the following lands is subject to the right of the United States to construct and maintain dams for the purpose of creating reservoirs in aid of navigation, as provided in the act of June 7, 1907 (30 Stat., 67), viz: SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, sec. 28, T. 145 N., R. 26 W.; lots 2, 7, 8, E. $\frac{1}{2}$ lot 3, sec. 5, W. $\frac{1}{2}$ SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, sec. 7, N. $\frac{1}{2}$ lot 3, N. $\frac{1}{2}$ lot 5, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, N. $\frac{1}{2}$ NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, sec. 8, lot 2, sec. 16, lot 1, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, sec. 18, lots 1, 3, 6, sec. 19, lots 4, 9, sec. 20, lot 8, sec. 28, lot 1, sec. 30, S. $\frac{1}{2}$ lot 2, sec. 31, all in T. 142 N., R. 27 W.; W. $\frac{1}{2}$ SW. $\frac{1}{4}$, sec. 32, T. 143 N., R. 27 W.; SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, W. $\frac{1}{2}$ NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, W. $\frac{1}{2}$ SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, W. $\frac{1}{2}$ NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, W. $\frac{1}{2}$ SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, sec. 4, E. $\frac{1}{2}$ lot 1, sec. 5, lot 3, sec. 13, S. $\frac{1}{2}$ SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, sec. 14, E. $\frac{1}{2}$ NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, sec. 16, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, sec. 21, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, sec. 23, lot 2, sec. 25, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, sec. 27, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, sec. 28, S. $\frac{1}{2}$ lot 1, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, sec. 29, T. 142 N., R. 28 W.; lots 7, 8, sec. 27,

N. $\frac{1}{2}$ NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, sec. 33, N. $\frac{1}{2}$ NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, sec. 34, lot 6, S. $\frac{1}{2}$ lot 7, sec. 36, T. 143 N., R. 28 W.; E. $\frac{1}{2}$ SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, sec. 2, S. $\frac{1}{2}$ NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, sec. 3, T. 141 N., R. 29 W.; W. $\frac{1}{2}$ NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, sec. 25, T. 143 N., R. 29 W.; N. $\frac{1}{2}$ lot 2, sec. 25, T. 142 N., R. 31 W.; lots 1, 2, 3, 4, 5, sec. 16, lot 1, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, sec. 17, lots 2, 3, 4, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, sec. 20, T. 143 N., R. 31 W.; E. $\frac{1}{2}$ NW. $\frac{1}{4}$, sec. 15, lot 2, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, sec. 16, T. 144 N., R. 31 W.; SW. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, sec. 16, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, sec. 17, T. 145 N., R. 31 W.; lots 1, 5, sec. 24, lot 1, sec. 25, T. 144 N., R. 32 W.

Very respectfully,

S. V. PROUDFIT,
Assistant Commissioner.

Approved:

FRANK PIERCE,
First Assistant Secretary.

CHIPPEWA AGRICULTURAL LANDS MINNESOTA.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, May 14, 1910.

REGISTER AND RECEIVER,
Cass Lake, Minnesota.

SIRS: 1. I inclose herewith a schedule containing a description of 646.46 acres of "cut-over" lands in the former Chippewa of the Mississippi Indian Reservation, being ceded Chippewa lands, which will be disposed of in accordance with the instructions of May 10, 1910, as modified by these instructions.

2. It appearing that a large number of persons made settlement on the lands in the Winnibigoshish, Chippewa of the Mississippi and Leech Lake reservations, described in the circular of May 10, 1910, on April 23 last, pursuant to telegrams received by your office from members of the Minnesota delegation in Congress, the second paragraph of rule 4, of the rules adopted May 10, 1910, is hereby amended, so that it shall read as follows:

Settlement on the "cut-over" lands, described in the circular in the above-mentioned reservations, since March 13, 1909, when they were withdrawn (37 L. D., 491), prior to April 23, 1910, will not be recognized, but preference will be given the prior legal settler on and after said date.

Very respectfully,

S. V. PROUDFIT,
Assistant Commissioner.

Approved:

FRANK PIERCE,
First Assistant Secretary.

ADDITIONAL SCHEDULE OF LANDS TO BE OPENED TO ENTRY JUNE 20, 1910.

CHIPPEWA OF THE MISSISSIPPI RESERVATION.

T. 145 N., R. 25 W.

	Acres.
Lots 2, 5, 8, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, sec. 2-----	161.16
S. $\frac{1}{2}$ SE. $\frac{1}{2}$, sec. 3-----	80.00
Lots 2, 3, W. $\frac{1}{2}$ NW. $\frac{1}{4}$, sec. 26-----	165.40
E. $\frac{1}{2}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, sec. 27-----	120.00
NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, sec. 28-----	40.00

T. 146 N., R. 25 W.

SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, lot 7, sec. 35-----	79.90
Total-----	646.46

PETER JUSKI.

Motion for review of departmental decision of October 25, 1909, 38 L. D., 271, denied by First Assistant Secretary Pierce, May 13, 1910.

**"CUT-OVER" CHIPPEWA LANDS—RESTORATION TO SETTLEMENT—
EXCHANGE OF ALLOTMENTS.**

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, May 17, 1910.

REGISTER AND RECEIVER,

Cass Lake, Crookston, and Duluth, Minnesota.

SIRS: 1. Pursuant to departmental instructions of April 23, 1910, the order of February 17, 1910, extending for one year from March 13, 1910, the withdrawal from settlement of the "cut-over" lands in the Winnibigoshish, Cass Lake, Chippewa of the Mississippi, and Leech Lake Indian Reservations, not included in the Minnesota National Forest and not yet opened to homestead entry, which withdrawal was first made March 13, 1909 (37 L. D., 491), for six months, and was subsequently extended for six months, is hereby vacated, except as to all lands included in swamp selection lists, Indian allotments or allotment applications, or other appropriation.

2. The following lands are included in pending allotment applications, and are not affected by this order, viz:

T. 145 N., R. 25 W.: Lots 2, 3, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 4, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 5, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 8, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec.

15, N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 16, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 17, N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 20, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 21, lots 2, 3, Sec. 26.

T. 146 N., R. 25 W.: N. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 17, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 19, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 20, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, N. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 28, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, W. $\frac{1}{2}$ SE. $\frac{1}{4}$, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 29, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 31, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 32, NW. $\frac{1}{4}$, Sec. 33.

T. 147 N., R. 26 W.: Lots 3, 4, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 1, lots 1, 2, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 2, E. $\frac{1}{2}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 3, lots 3, 4, Sec. 8, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 10; lots 1 and 2, Sec. 21.

T. 148 N., R. 26 W.: Lot 1, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 15.

T. 148 N., R. 27 W.: NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 4, lots 4, 10, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 5, lot 3, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, SE. $\frac{1}{4}$, Sec. 6, W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 7, N. $\frac{1}{2}$ NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 8, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 20, S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 29.

T. 142 N., R. 28 W.: E. $\frac{1}{2}$ SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 16.

T. 148 N., R. 28 W.: SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, lot 1, Sec. 5, N. $\frac{1}{2}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ SE. $\frac{1}{4}$, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 9, S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 10, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 12, lot 2, Sec. 13, lot 3, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 14, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, E. $\frac{1}{2}$ SE. $\frac{1}{4}$, NE. $\frac{1}{4}$, NW. $\frac{1}{4}$, Sec. 15, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 21, N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 22, lot 2, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 25, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, lot 3, Sec. 26.

T. 141 N., R. 30 W.: SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 15.

T. 146 N., R. 30 W.: W. $\frac{1}{2}$ SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 5, lots 15, 16, Sec. 7, lot 2, Sec. 12, W. $\frac{1}{2}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, S. $\frac{1}{2}$ SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 14, lots 2, 7, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 15, lots 3, 4, 5, Sec. 23, lot 2, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 24.

T. 147 N., R. 30 W.: E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 26.

T. 142 N., R. 31 W.: NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 5.

T. 143 N., R. 31 W.: Lot 6, Sec. 6, lots 2, 3, Sec. 17, Lot 2, Sec. 28, N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 29.

T. 144 N., R. 31 W.: Lot 3, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 15.

T. 145 N., R. 31 W.: E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 9, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 16, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$ (or lots 7 and 8), NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 17, lot 2, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ (or lot 8), SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 18, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, NE. $\frac{1}{4}$, Sec. 19, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 20, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$, Sec. 21, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 28, NE. $\frac{1}{4}$, Sec. 29, E. $\frac{1}{2}$ SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, N. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 33.

T. 146 N., R. 31 W.: Lots 4, 5, Sec. 4, lot 1, Sec. 5, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 6, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 12, lots 5, 6, Sec. 18.

T. 147 N., R. 31 W.: Lot 4, Sec. 25, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 26.

T. 143 N., R. 32 W.: NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 1.

T. 145 N., R. 32 W.: S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 13, E. $\frac{1}{2}$ NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ (or N. $\frac{1}{2}$ of lot 5), W. $\frac{1}{2}$ NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, E. $\frac{1}{2}$ SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ (or lot 11), W. $\frac{1}{2}$ SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 13.

T. 146 N., R. 32 W.: SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 1.

3. Furthermore, on receipt from the Superintendent of the Leech Lake Indian School, of the description of land selected by an Indian under the act of May 23, 1908 (35 Stat., 268), in lieu of lands in the Minnesota national forest, you will note on the tract books and plats of your office a notation showing such selection, which notation shall constitute a prior filing against such lands until the necessary steps can be taken to formally effect the exchange. The Superintendent of Leech Lake agency will at the same time furnish the Superintendent of Logging a description of the land applied for and of the land relinquished and information in regard to the timber claimed to be on each tract, as provided in the instructions sent him dated May 26, 1909.

4. Indians having allotments within the limits of the Minnesota National Forest may relinquish such allotments and select lieu lands outside of such limits, subject to the right of removal of the timber therefrom, where the timber has been sold, or where the lands selected contain a greater amount of timber than the lands allotted within the Minnesota National Forest contained, the right is reserved to sell and remove the timber. (See the rules adopted May 3, 1909 (37 L. D., 665).

5. In order to provide an orderly method by which "cut over" lands in the Chippewa of the Mississippi, Cass Lake, Leech Lake, and Winnibigoshish Indian reservations may be opened to settlement under the act of May 23, 1908 (35 Stat., 268), the Superintendent of Logging, Cass Lake, Minnesota, will hereafter file in the district land office at Cass Lake, as soon as a section or sections are entirely cut over, and the timber is all removed therefrom, a notice giving a description of the subdivisions cut over, and from and after such filing in said office, the hour of which you will note on the notice, as well as on a duplicate to be forwarded to this office by the Superintendent of Logging, the lands will be subject to settlement, should there be no appropriation thereof. You will examine your records, and note on the paper filed in your office any appropriation of the lands. You will at once post a copy of the notice in your office, and furnish a copy to the local newspapers as an item of news, but not as an advertisement, and to the postmaster at Cass Lake, with a request that he post same in his office. The lands will not be subject to entry until they are included in a schedule of agricultural lands, as provided in the act of January 14, 1889 (25 Stat., 642). No rights will be gained by settling on lands from which the timber has not been cut and removed, and notice has not been given in accordance with the foregoing. The Superintendent of Logging may withhold from notice as aforesaid tracts covered by logging roads, which are necessary to future logging operations, notifying this office thereof. The

Superintendent of Logging will give notice to you as expeditiously as possible after a section has been cut clean and the timber removed.

Very respectfully,

S. V. PROUDFIT,
Assistant Commissioner.

Approved:

R. A. BALLINGER,
Secretary.

RIGHT OF WAY FOR PIPE LINES IN ARKANSAS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, May 21, 1910.

REGISTER AND RECEIVER,
Camden, Arkansas.

SIRS: By act approved April 12, 1910 (Public, No. 129), Congress granted right of way through the State of Arkansas for oil and gas pipe lines, subject to certain conditions and restrictions therein indicated, upon application therefor by any citizen of the United States, or any company or corporation authorized by its charter to transport oil, crude or refined, or natural gas.

This act is similar in its requirements to the right of way acts of May 21, 1896 [29 Stat., 127], and March 3, 1891 [26 Stat., 1095], and the regulations approved June 6, 1908 (36 L. D., 567), applicable to such acts, modified to meet the requirements of the case, will govern applications under this act.

Very respectfully,

S. V. PROUDFIT,
Assistant Commissioner.

Approved:

R. A. BALLINGER,
Secretary.

VACATION OF PATENT—NOTATION UPON RECORDS—APPLICATION
TO ENTER.

HIRAM M. HAMILTON.

While the legal effect of a final decree of a court of competent jurisdiction cancelling a patent issued upon a coal-land entry is to revert title in the government and restore the land to the public domain, no rights are acquired by the presentation of an application to enter the land until notation of the cancellation upon the records of the local office.

First Assistant Secretary Pierce to the Commissioner of the General Land Office, May 23, 1910. (E. B. C.)
(O. L.)

Hiram M. Hamilton, who, by John Pearson, his attorney in fact, applied, pursuant to the act of June 4, 1897 (30 Stat., 36), to select the NW. $\frac{1}{4}$, Sec. 12, T. 12 N., R. 5 E., W. M. (No. 01410), Vancouver, Washington, land district, has appealed from your office decision of October 11, 1909, affirming the action of the local officers in their rejection of the proffered application.

From the record it appears that on November 17, 1908, the above application was presented, accompanied by a certified copy of the decree mentioned below, and was on that date rejected "because of conflict with coal entry No. 28—Joel M. Long & Villa R. Mohler." On the same day Pearson personally acknowledged due service of notice of the rejection and of the right of appeal.

The decree above referred to was rendered November 13, 1908, in the case of United States *v.* Portland Coal and Coke Company, a corporation, Oregon Railroad and Navigation Company, a corporation, Joel M. Long and Jane Doe Long, his wife, E. E. Lytle and Lizzie M. Lytle, his wife, in the United States Circuit Court for the Western District of Washington, Western Division, and it was therein ordered, adjudged, and decreed that the patent issued by the United States, April 20, 1903, to Joel M. Long and Villa R. Mohler, purporting to convey the NW. $\frac{1}{4}$ and N. $\frac{1}{2}$ SW. $\frac{1}{4}$ of the above section 12 be canceled, annulled, and set aside; the defendants were foreclosed of any interest, right, or title to said lands; and the United States was decreed to be the legal and equitable owner of said lands, and its title was confirmed and quieted. This decree is indorsed as filed November 14, 1908 (in court), and the copy presented was certified by the clerk on November 16, 1908.

According to the opinion handed down October 5, 1908, by C. H. Hanford, District Judge, in this and five other similar cases (173 Fed., 566), it appears that the coal-land patents involved were annulled because of an unlawful combination or "pooling scheme" among the several entrymen for exploiting and operating the coal lands.

December 17, 1908, the applicant's appeal to your office was filed with the local officers, accompanied by a certified copy of a waiver, dated November 28, 1908, by counsel for defendants Lytle and his wife, of their right of appeal from the above decree, and also by a certificate from the clerk of the court that an order *pro confesso*, for failure to answer, was taken against the two defendant corporations and Joel M. Long and his wife in November, 1907, and that Villa R. Mohler was dismissed as a defendant April 15, 1908. These latter certificates of the clerk bear date December 11, 1908.

Considering the applicant's appeal, your office found that the record of patented coal entry No. 28 was still intact on the books both of the General Land Office and the local office, no instructions having been issued directing the notation of its cancellation as the result of the decree favorable to the Government. Citing the circular of July 14, 1899 (29 L. D., 29), and the case of *Young v. Peck* (32 L. D., 102), the rejection of the application was affirmed.

In the pending appeal it is contended that your office erred in not holding that the land was vacant when the application was presented, for the reason that the patent issued upon the coal entry had been canceled by the decree, which had become final, as shown by the waiver of the right of appeal furnished; in holding that the land could not be applied for until the cancellation of the coal entry had been noted on the records of the local office; and in not directing the local officers to note the cancellation of such entry and approve appellant's application. In other words, the appellant's theory of the case appears to be that the coal entry, having become merged in the patent, necessarily fell within the judicial annulment of such patent, and that thereupon the land *eo instanti* was restored to the public domain and necessarily became subject to entry by the first qualified applicant, without any action on the part of the land department affecting its record.

While the legal effect of a final decree canceling a patent is to revest title to the land in the Government and restore it to the public domain, nevertheless the records in the land department still bear the memorandum of the entry and, as it would appear, should be corrected to show the cancellation before other entry of the land is allowed, in the interest of orderly administration.

The local officers have no authority, in the absence of express directions from your office, to note cancellation of entries appearing intact upon their records, with the exception that upon the filing by an entryman of a relinquishment of his entry, the register and receiver are empowered to cancel the relinquished entry and thereupon to receive applications for the land, if the rights of third parties are not affected.

The question now presented is not new to the Department. In the case of *Emory H. Marker and eighty-eight others* (23 L. D., 407), August 8, 1896, it was held (syllabus):

On the judicial vacation of a patent issued under a railroad grant, the Secretary of the Interior may lawfully fix a day when the lands embraced in such decree shall be opened to entry; and in such case an application to enter filed prior to the time so fixed should not be allowed.

The *Marker* case was cited and the principle therein announced applied in the case of *Matthews et al. v. Lines* (29 L. D., 178), where the Department awarded the land involved to the first qualified appli-

cant presenting his application after the notation upon the local records of the cancellation of the patented cash entry as result of the judicial vacation of the patent. It was there said:

It is insisted that two leading propositions announced in your office decision are inconsistent the one with the other.

1st. That the land in dispute became subject to entry upon the signing of the decree of the court canceling the patent; and

2d. That the local officers did not err in rejecting applications while the entry remained of record in their office after the signing of the decree.

The contention is suggestive that the propositions may have been too broadly stated. As an administrative rule the latter proposition is in accordance with the latest instructions of the Department to registers and receivers on the subject (29 L. D., 29).

The first proposition is too broad in this: that it assumes that the decree of the court canceling the patent operated to cancel the entry on the records of the Department also, and allowed of no time within which to take the necessary steps to have the records of the land department conformed to the decree. In such a case it would be more in accord with the general purpose of disposing of the public lands through the land department to hold that the decree of the court canceling the patent took effect so as to open the land to entry on the cancellation of the entry on the records of the local office, pursuant to notice through your office of the decree.

The departmental instructions referred to in the above quotation are those of July 14, 1899 (29 L. D., 29), which are as follows:

In accordance with departmental instructions in the case of *John Stewart v. Minnie S. Peterson* (28 L. D., 515), it is hereby directed that no application will be received, or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record, until said entry has been canceled upon the records of the local office. Thereafter, and until the period accorded a successful contestant has expired, or he has waived his preferred right, applications may be received, entered, and held subject to the rights of the contestant, the same to be disposed of in the order of filing upon the expiration of the period accorded the successful contestant or upon the filing of his waiver of his preferred right.

Cancellation of entries should be promptly noted upon your records upon receipt of instructions by this office to that effect.

The case of *Young v. Peck* (32 L. D., 102), cited by your office, involved a desert-land entry canceled as the result of a departmental adjudication and the above administrative rule was strictly applied.

In the case of *Alice M. Reason* (36 L. D., 279) it was said:

It is the final judgment of a court of competent jurisdiction that operates to revest title to the land in the United States and to restore to the public domain land once patented. No action of the land department is necessary. When and how it becomes open to entry depends, as in respect to all other parts of the public domain, on action of the land department.

In the late case, August 19, 1908, of *Gunderson v. N. P. Ry. Co.* (37 L. D., 115), involving a contest between a homestead applicant, who had filed immediately after the notation of cancellation, and the company, which had presented a premature application to select lands

embraced in a patent annulled by judicial decree, the Department said:

It is observed that at the time the company's selection was tendered the entry of Holland still remained of record in the local office though the decree of the court cancelling the patent issued thereon had been rendered and the local officers had notice thereof. Counsel while admitting the existence of the settled rule that no rights can be initiated by the filing of an application to enter or select land covered by an entry of record, contend that the decree of the court of its own force operated to clear the record and that no further action by the land department was necessary, and that the tract in question thereafter became subject to entry by the first legal applicant.

This position is not warranted by any of the decisions of the Department and is contrary to the well-settled practice obtaining in analogous cases. Though the decree of the court operated to revest the title in the United States, it still remained for the land department to restore the land to entry by taking such steps, in conformity with the decree, as would clear its records of the entry on which the patent vacated by the court was based. The local officers very properly declined to take these steps until directed by your office and the selection of the company tendered before the land was restored to entry was properly rejected. The rule of administration adopted in similar cases has the sanction of the courts and the Department is of opinion the case under consideration falls within it. (*Holt v. Murphy*, 207 U. S., 407, 415.)

It is urged that the local officers did not, as reported by them, reject the selection immediately but deferred action until after the land had been restored to entry. Even though this could be established it would be immaterial as the company is entitled to a decision only upon the facts as they existed at the date the selection was tendered and as before stated the land was not then subject to selection by it. (*Eaton et al. v. Northern Pacific Ry. Co.*, 33 L. D., 426, 432, and cases cited.)

The administrative rule and practice of the land department, to the effect "that after a decision of the Secretary had been rendered that a former entry was void and should be canceled, no subsequent entry of the land could be made until that decision was officially communicated to the local land officers and the notation of the cancellation was made on their plats and records," was, in the case of *Germania Iron Co. v. James* (89 Fed., 811), by the Circuit Court of Appeals, Eighth Circuit, held reasonable and just, and the failure of the Department to follow such rule and practice was adjudged to be error in law, entitling the party aggrieved to invoke relief through the courts in a trusteeship proceeding against the patentee of the land.

This rule was also commented upon in *Holt v. Murphy* (207 U. S., 407, 415), where the court said:

Such a rule, when established in the land department, will not be overthrown or ignored by the courts, unless they are clearly convinced that it is wrong. So far from this being true of this rule, we are of opinion that to enforce it will tend to prevent confusion and conflict of claims.

The Department is unable to perceive any good reason for undertaking to make any distinction, as appellant's contention suggests,

in the application of the rule of practice; that is, to follow it where entry is canceled by an adjudication of the land department and not to apply the rule where the entry falls as the result of the judicial determination of the invalidity of the patent based upon the entry. Good administration and the public interest demand adherence to it in the latter no less than in the former instance, while the mischief to be averted and the objects to be accomplished are the same in each case.

As shown by the above authorities, the Department has applied the rule in a number of cases essentially similar to that at bar, and applicants will be presumed to be cognizant of such decisions and of the well-established practice of the land department.

It is to be observed that in the present case, neither at the time the application was presented to the local officers nor since, has there been furnished conclusive evidence of the finality of the decree of the Circuit Court.

The certificates of the clerk submitted to your office were not conclusive and fell short of establishing the finality of the decree. The order *pro confesso*, taken in accordance with the 18th equity rule, was but a step in the litigation upon which the decree which followed rested, and only two of the defendants waived their right of appeal. Those defendants against whom the order *pro confesso* was entered, not having waived their right to appeal, might, within six months after the entry of the final decree in the Circuit Court, that being the time limited by section 11 of the act of March 3, 1891 (26 Stat., 826), have prosecuted an appeal to the Circuit Court of Appeals, since a decree *pro confesso* does not preclude an appeal on the part of defaulting parties.

An appeal can be taken from the final decree after a bill has been taken as confessed. Upon such an appeal the decree may be reversed for defect in the service of the subpoena; for failure to appoint a guardian *ad litem*, when required; it seems for want of indispensable parties, and for failure to set aside the decree upon a proper application. The only question for consideration of the court is whether the allegations in the bill are sufficient to support the decree.

[1 Foster's Federal Practice, 3d Edition, page 280.]

The following are cases in which appeals of such nature were entertained: *Thomson v. Wooster* (114 U. S., 104); *Dobson v. Hartford Carpet Company* (114 U. S., 439), and *Ohio Central Railroad Company v. Central Trust Company* (133 U. S., 83).

In the case last cited, referring to a decree *pro confesso*, the court said (p. 91):

Although the defendant may not be allowed, on appeal, to question the want of testimony or the sufficiency or amount of the evidence, he is not precluded from contesting the sufficiency of the bill, or from insisting that the averments contained in it do not justify the decree.

Under the 18th rule in equity, where the bill is taken *pro confesso*, the cause is proceeded in *ex parte*, "and the matter of the bill may be decreed by the court;" and hence if a decree be passed not confined to the matter of the bill, it may be attacked on appeal for that reason.

In the case of Alice M. Reason (36 L. D., 279, 281) the Department said:

If title be recovered by judicial proceedings it is not certainly revested until the decree is final. In the face of proceedings pending in a proper court questioning the finality or conclusiveness of such a decree, the land department should not permit another entry of the land. It follows that the land department may properly require evidence of the finality and conclusiveness of the decree purporting to cancel a patent before permitting another entry for the same land.

When your office shall be furnished with proper and satisfactory evidence of the finality of the decree annulling the coal-land patent it will become your duty promptly to cause a formal cancellation of the entry, upon which such patent was issued, to be noted, and thereby clear the records of the land department for future applications and entries. In the absence of the notation of such cancellation, the local officers will reject all proffered applications, applying the same rule as obtains when entries are canceled as the result of a departmental adjudication.

Furthermore, when these lands do become subject to entry, they having once been entered and patented as coal lands, and such patent having been vacated because of the disqualification of the entryman, and not because of the nonmineral character of the land, an application for the same under the nonmineral land laws should, as a measure of precaution, be scrutinized with care, and be accompanied by a full and explicit showing, duly corroborated, as to the noncoal character of the tracts before entry is allowed, for the reason that the mere allegation of the nonmineral applicant that the tracts are not coal lands is not sufficient to overcome the former finding of the land department that they were coal in character when the coal-land patent was issued.

From the foregoing it follows that the action of the local officers in rejecting the proffered forest lieu application was correct. Your office decision affirming such action is accordingly affirmed.

RECLAMATION WITHDRAWAL—PRIOR SETTLEMENT UPON UNSURVEYED LAND—RIGHT TO COMPLETE ENTRY.

WILLIAM BOYLE.

A settler on unsurveyed land subsequently embraced in a withdrawal under the reclamation act as subject to reclamation under an irrigation project, may, upon survey of the land, make and complete entry for the full area allowed

by law and appropriated by his settlement, notwithstanding such withdrawal previous to entry, free of the added conditions and limitations imposed by the reclamation act upon settlers subsequent to withdrawal.

First Assistant Secretary Pierce to the Commissioner of the General Land Office, May 23, 1910. (J. R. W.)
(O. L.)

William Boyle appealed from your decision of December 10, 1909, requiring him to show compliance with section 5, act of June 17, 1902 (32 Stat., 388, 389), by proof of reclamation of half the irrigable area of his entry and full payment of all charges, fees and commissions due on account of the land in his homestead entry for S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 33, and S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 34, T. 7 S., R. 22 W., G. & S. R. M., Phoenix, Arizona.

December 24, 1901, Boyle settled on the land, unsurveyed. August 25, 1902, it was withdrawn for reclamation under act of June 17, 1902, *supra*. July 20, 1905, it was withdrawn for use in construction of reclamation works. March 3, 1907, the township plat was filed in the local office. December 14, 1908, the withdrawal of July 20, 1905, for use in the project was, in effect, released and the land withdrawn for reclamation. January 8, 1909, Boyle made homestead entry, alleging settlement December 24, 1901. March 15, 1909, he submitted final proof, which you examined and found—

sufficient as to residence, cultivation and improvements required by the ordinary provisions of the homestead law. Further residence on the land is not required in order to obtain patent, and final certificate and patent will issue upon proof that at least one-half of the irrigable area in the entry, as finally adjusted, has been reclaimed, and that all the charges, fees and commissions due on account thereof have been paid to the proper receiving officer of the government.

The question presented is whether a settler on unsurveyed land prior to withdrawal under the reclamation act, which is subsequently withdrawn for reclamation, may complete his entry for the full area allowed by law and appropriated by his settlement, irrespective of such withdrawals, free of the added conditions imposed by the reclamation act upon settlers after such withdrawal: Does a homestead settlement on public lands before a withdrawal for reclamation except the land settled upon from that proviso of section 3, that—

all lands entered and entries made under the homestead law within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms and conditions of this act.

Prior to the act of May 14, 1880 (21 Stat., 140), homestead appropriation of public lands could be initiated only by entry and record evidence of intent to claim the land under the homestead law. No right was obtained in the land by settlement except an uncertain expectancy of a privilege to make entry in preference to any one else in event the government should open the land to entry. The

act of May 14, 1880, gave the settler a right in the land from his settlement. It placed the homestead settler upon exact equality with the pre-emption settler and gave further a right relating back to date of his settlement. The act provided:

That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the pre-emption laws to put their claims of record, and his right shall relate back to the date of settlement the same as if he settled under the pre-emption laws.

In *Tarpey v. Madsen* (178 U. S., 215) the court on this statute held (p. 219):

The right of one who has actually occupied, with intent to make a homestead or pre-emption entry, can not be defeated by the mere lack of a place in which to make a record of his intent. . . . Where the accident or omission is not the fault of the party but of the government, or some officer of the government, such accident or omission can not defeat the right of the individual. . . . [220] If Olney, the original entryman, was pressing his claims every intendment should be in his favor in order to perfect the title which he was seeking to acquire. . . . It must be remembered that mere occupation of the public lands gives no right as against the government. . . . [221] Notwithstanding this recognition of the rights of individual occupants as against all other individuals, it has been uniformly held that no rights are thus acquired as against the United States. *Frisbie v. Whitney* (9 Wall., 187).

In *St. Paul, Minneapolis & Manitoba Ry. Co. v. Donohue* (210 U. S., 21, 30), construing this statute, the court held that—

It was not until May 14, 1880, that a homestead entry (settlement) was permitted to be made upon unsurveyed public land. The statute which operated this important change moreover modified the homestead law in an important particular. Thus for the first time, both as to the surveyed and unsurveyed public lands, the right of the homestead settler was allowed to be initiated by and to arise from the act of settlement and not from the record of the claim made in the Land Office. . . . [31] Both under the pre-emption law and under the homestead law, after the act of 1880, the rights of the settler were initiated by settlement.

It is thus clear that right of the settler is initiated and fixed by date of settlement when followed with diligence in making his claim of record in the land office. Lack of opportunity nowise impairs his right when settlement is pursued with diligence and consummated by final entry; his right relates to his settlement and is measured by what would then have been its extent and character except as the right so initiated may have to yield to the superior right of the United States. Except for some superior right, or necessity of the United States, he would, on the existing facts, be entitled to an unrestricted and unencumbered title by patent in fee to the lands so settled upon. As his right initiated December 24, 1901, it fully

matured December 24, 1906, while the land was still unsurveyed, and because of lack of survey without his fault but solely by default of the United States he had no opportunity to record his right. It was such a case as supposed by the court in *Tarpey v. Madsen*, *supra*, and in words of the court his right "can not be defeated by the mere lack of a place in which to make a record of his intent; . . . such accident or omission can not defeat the right of the individual."

While he was thus prevented from making record of his right, July 20, 1905, the land was erroneously withdrawn by the United States from all form of entry for supposed necessity of its use by the United States in construction of public works for reclamation of its other public lands. Had such necessity existed in fact he could never have obtained title, for that necessity would have displaced his individual right and his only redress would have been to claim compensation for the injury—that is the loss—inflicted upon him. But the supposed necessity did not exist in fact; his land was never appropriated to public use, and when that error was acknowledged and the withdrawal for public use was, in effect, revoked December 14, 1908, by withdrawal of the public lands within the project for reclamation merely, his right remained unaffected. The land was then equitably his private property for he had before that time fully complied with the law so far as the government had given opportunity. He had resided on, cultivated and improved the land as his home in good faith for more than five years. The government simply owed to him opportunity to make his entry of record and to prove the facts, and on proof of the facts owed him patent title to the land. In fact and equitable aspect, the land had passed into private ownership. It was legally appropriated to individual right and was no longer in any proper sense public lands. The United States was mere dry trustee of the legal title to his use.

The reclamation act, section 2, provides, among other things:

The Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning any surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided*, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms and conditions of this act.

The provisions, limitations, charges, terms and conditions of the act, briefly summarized, are: (1) exception from commutation privilege; (2) limitation of area of "farm units" to not less than forty acres; (3) reclamation of at least half the irrigable area of the entry; (4) payment of the apportioned water charges in not more than ten annual payments; (5) water service to not more than one hundred and sixty acres of one owner; (6) water service only to owners resi-

dent on or in the vicinity of the land. The first, second and third affect the entry in its life, as conditions to final proof, narrowing the homestead settler's right on public lands. The fourth imposes a new condition of payment of apportioned cost of reclamation charges as security of the United States for its expenditure. The fifth and sixth affect the land after patent, limiting area for which the owner may have water service and the owner's freedom of domicile, enforced by forfeiture of water service. Four, five and six look forward beyond the time that right to a title vests under the homestead law, continuing as long as the government retains title to the reclamation works.

Imposition of new, onerous and restrictive conditions should not be made on one who has fully performed and after he has fully earned title under the law of his settlement December 24, 1906, so far as he had opportunity to make full performance. The settler on being given late opportunity to prove his full performance is met by these six added conditions not existing and not contemplated by him or by the government when his right to the land attached.

In view of the Department they can not be held to apply to lands appropriated prior to withdrawal under the reclamation act, where all conditions of the law at the time the settlement was made have been faithfully performed by the original settler or his privies in blood or law, successors to his original act of settlement. That the reclamation act was not intended to affect vested or inchoate rights is shown by section eight, relating more particularly to waters, which declares—

that nothing in this act shall be construed as affecting . . . any vested right . . . and nothing herein shall in any way affect any right of any State, or of the Federal Government, or of any land owner.

While this section relates only to waters and water rights, it nevertheless shows an intent not to interfere with or impair rights actually existing when a reclamation project is entered upon. While Boyle's entry was not made until after the withdrawal for reclamation, that was solely due to default of the United States in failing to survey it and give him opportunity to record his settlement. It is a doctrine settled in the courts, that where several successive acts are to be done in acquisition of a legal title, that title, when complete, relates to date and has effect from the first act done for its acquirement. This doctrine is one of frequent application.

In *Shepley v. Cowan* (91 U. S., 331, 337) the question between a pre-emption settler and a State selection, neither of which could be made of record except for surveyed land. The Court held that:

In either case the land must have been surveyed and thus offered for sale or settlement. The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right as against others

to the premises. The patent, which is afterwards issued, relates back to the date of the initiatory act, and cuts off all intervening claimants. Thus the patent from a State selection takes effect as of the time when the selection is made and reported to the Land Office; and the patent upon a pre-emption settlement takes effect from the time of the settlement as disclosed in the declaratory statement or proofs of the settler to the register of the local land office.

In *Pickering v. Lomax* (145 U. S., 310, 316) the controversy was between two claimants of title deraigned under an Indian to whom land was granted by a treaty and patent issued. The title so granted was alienable only upon approval of the Indian's conveyance by the President of the United States. The Indian made a deed which was not approved by the President until long afterward, not until after the Indian's death. The court held that—

Nor do we consider it material that the grantee had in the meantime died, since, if the ratification be retroactive, it is as if it were indorsed upon the deed when given and inures to the benefit of the grantee of Horton, the original grantee—not as a new title acquired by the warrantor subsequent to his deed inured to the benefit of the grantee, but as a deed imperfect when executed may be made perfect as of the date when delivered. This was the ruling of the court in *Steeple v. Downing* (60 Indiana, 478).

In *United States v. Anderson* (194 U. S., 394, 399) the question was whether the United States was responsible to its later patentee for money recovered for trespass upon the land after application for patent and before patent was granted. The Court held that:

Under these circumstances the case is one for the application of the fiction of relation, by which, in the interest of justice, a legal title is held to relate back to the initiatory step for the acquisition of the land. Many cases illustrating the doctrine in various aspects have been determined in this court (citing numerous decisions). Indeed, this case is one coming peculiarly within the principle of relation, as the approval of the selections manifestly imported that at the time of the application for selection the land in question was rightfully claimed by the applicant.

The Court cites its opinion in *United States v. Loughrey* (172 U. S., 206, 218), where similar application of the doctrine of relation was made. In *United States v. Detroit Timber and Lumber Company*, the question was a claim of trespass upon public lands by timber cutting between the date of entry and the date of patent. The Court held:

A patent from the United States operates to transfer the title, not merely from the date of patent, but from the inception of the equitable right upon which it is based. *Shepley v. Cowan* (91 U. S., 330). Indeed, this is generally true in the case of the merging of an equitable right into a legal title. Although the patents in this case were not issued until after the sales of the timber, yet when issued they became operative as of the date of the original entry.

These cases taken in connection with the construction of the act of May 14, 1880, as made in the decisions in *Tarpey v. Madsen* and in *St. Paul, Minneapolis & Manitoba Ry. Co. v. Donohue*, above cited,

make Boyle's right relate back to the date of his settlement. December 24, 1901.

This is an eminently fit case for application of the doctrine. The Yuma project in which this land lies is not complete and the reclamation works are not so far complete as to furnish water for irrigation of the land. Boyle began his acts of performance before any reclamation work was undertaken by the United States, even before the reclamation act was passed. Neither he nor the government then contemplated the conditions and limitations of his title to the land that are now contemplated to be imposed upon it. No public necessity required appropriation of the land to public use and no interest of the United States requires imposition of the added conditions. As the works are not in condition to deliver the water, the requirement that he must show reclamation of half the area of his entry imposes on him necessity to construct reclamation works or wait indefinitely for the United States to do so. The United States is in no condition to insist on his performance of a condition its own delay has rendered impossible of performance. If with all its resources the United States has not in more than seven years from initiation of its project brought its works to a state of practical efficiency, how can an entryman of small means overcome the natural difficulties incident to diversion of water courses that have so long baffled the great resources of the government? If he is made to conform to "farm units" of not less than forty acres, he may be required to yield to others three-fourths of the land settled upon, cultivated and occupied for five years as a home in full compliance with a law promising title in fee to the entire tract.

This confiscation of three-fourths of his land is not for profit of the United States but to give it to others who may in future perform what he has already fully performed in faith of a promise of title to it.

As to payment of apportioned water charges, it must be remembered that under the doctrine of relation his was private land when the reclamation project was undertaken. His settlement had severed it from the public domain. It rests with him as with other private owners to subject his land to the reclamation act or not. His appeal states that he has done so. The charges have not been apportioned, but if he subject his land the lien will attach when the charges are apportioned, as to other land in private ownership, and the United States has the same security as upon other lands of private owners. The possibility that the works may be successfully completed to serve this land at some indefinite future time, so that charges may be at some future time apportioned to it, is no reason justifying withholding title already fully earned and now due a settler and private

owner before the works were undertaken. As to the conditions subsequent to passing of title, imposed by the Reclamation Act, Boyle, in common with other private owners, must conform to them as to area of land for which he can claim service and as to residence on or in vicinity of his land.

It is further to be noticed that supervision of this entry for compliance with the added requirements of the reclamation act, which delay of the United States in completing its project renders impossible for an indefinite time, not merely deprives Boyle of full utilization and enjoyment of the title he has fully earned under the law of his settlement but deprives him of the running of limitation and benefit of the confirmatory provisions of section 7, act of March 3, 1891 (26 Stat., 1095), leaving his entry open indefinitely subject to attack. Congress intended by that act that homestead entryman should be protected at two years after submission of satisfactory proof of compliance with the law of their entry. Entrymen within a reclamation project are as fully entitled as others to benefit of this statute of repose.

Had Boyle made an entry before the withdrawal his right to perfect it would not have been affected. He would not have been required to comply with the conditions and limitations of the act. Instructions (33 L. D., 607, 608, par. fifth). An entry made during a withdrawal, revoked and afterward renewed, is in the same condition as any entry made before any withdrawal. The conditions and limitations once existing are not reimposed by a second withdrawal. Opinion (34 L. D., 445). This would be so had he made no improvement or settlement or done no acts of performance, but had a mere entry, prior to withdrawal. But his settlement under a law inviting it to be made on unsurveyed land gave him right to acquire the title subject only to its being taken by the government for its own use. The government has no use for it. His lack of record entry before the withdrawal is due only to lack of opportunity to make it, not to his fault, and under act of May 14, 1880, his right by settlement, diligently pursued, must be equal to that of one who before withdrawal made entry.

Your decision is therefore reversed and you will cause to be issued a final receipt and in due course a patent for the land, as in cases of satisfactory final homestead proof for lands not within reclamation projects. Such course will also be followed in all cases wherein it is satisfactorily shown that settlement was *bona fide* made on lands thereafter included in reclamation projects where such settlements have been diligently prosecuted and the homestead law fully complied with.

STATE SELECTIONS UNDER GRANTS FOR EDUCATIONAL AND OTHER PURPOSES.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, May 24, 1910.

REGISTERS AND RECEIVERS,

United States Land Offices.

GENTLEMEN: Rules 7, 12 and 13 of the regulations governing the selection of lands by States and Territories under grants for educational and other purposes, approved April 25, 1907 (35 L. D., 537), are hereby amended to read as follows:

7. Where indemnity is sought for school lands in place, because of their inclusion within any Indian, military, or other reservation, the list of selections must in every case be accompanied by a certificate of the officer or officers charged with the care and disposal of school lands, that the State has not previously sold or disposed of, or contracted to sell or dispose of, any of said lands used as bases, or any part thereof; that the said lands are not in the possession of, or subject to the claim of any third party under any law or permission of the State or Territory; and within three months after the filing of any such list of selections, the State or Territory must in addition file a certificate from the recorder of deeds or official custodian of the records of transfers of real estate in the proper county, or from a reliable and responsible abstractor, or abstract company, that no instrument purporting to convey or in any way encumber the title to any of said lands used as bases, is of record, or on file in the office of such custodian, and upon the report of the local officers of the failure of the State to file such certificate within the required time, any selection upon such base lands may be canceled without previous notice. No certificate from an abstractor or abstract company will be accepted until approval by the Commissioner of the General Land Office of a favorable report of the Chief of Field Division or United States District Attorney whose division or district embraces the lands in question as to the reliability and responsibility of such abstractor or company.

12. Surveyed lands of the United States reserved or withdrawn from entry, location and selection under the general land laws, and thereafter restored to the public domain (not under a special statute), may be selected in satisfaction of grants or reservations in aid of common schools, if of the character contemplated thereby, in such manner as shall be prescribed in the Proclamations or notices of

restoration. Lists of selections received by mail, not more than three days prior to the day on which the lands are opened to entry, location and selection generally, will be treated as if received on the day of such opening, and will be considered as proffered after the claims of all persons present at the time of the opening of the office have been received, but a list received by mail more than three days prior to the day of opening will be rejected as prematurely filed.

13. No application will be allowed for lands covered by an existing selection or entry, nor will any right be recognized as initiated by the tender of any such application. In any case, however, where for good and sufficient reason a selection has been held for cancellation, the State or Territory may be permitted to relinquish such selection, and with such relinquishment tender a new application for the same land. This relinquishment and application must be accompanied by a statement, under oath, of the officer, or officers, of the State or Territory, charged with the selection of lands, showing that proper precaution was taken, in the first instance, to avoid the tender of a defective selection, and will be forwarded to the General Land Office, where the case will be considered, and, if the showing made is found satisfactory, the relinquishment will be accepted and the new application returned for allowance as of the date of filing. The statement accompanying such relinquishment and application will be closely scrutinized and, unless the utmost good faith is shown, the new application will be rejected.

Amendment of indemnity school land selections by the substitution of new and valid base, in whole or in part, in place of that originally tendered, defective from any cause, may be allowed, in the discretion of the Commissioner of the General Land Office. Applications in such cases must be accompanied by a statement, under oath, of the officer or officers indicated in the paragraph next above, fully explaining the tender of the original defective base, and how the error or mistake occurred, and will be forwarded to the General Land Office for consideration, where, if it is believed that every reasonable exertion and precaution was taken to avoid the tender of such defective base, the substitution of the new and valid base may be permitted in cases where no intervening claim exists.

Very respectfully,

S. V. PROUDFIT,
Assistant Commissioner.

Approved:

R. A. BALLINGER,
Secretary.

HOMESTEAD—QUALIFICATION—OWNERSHIP OF LAND—CONTRACT OF PURCHASE.**EARHART v. REIN.**

One who enters into an oral agreement to purchase land, and makes part payment of the purchase price, is not the proprietor of the land within the meaning of the provision of the homestead law declaring disqualified to make homestead entry one who is the proprietor of more than 160 acres, where under the laws of the State such oral agreement and part payment do not constitute such part performance as will take the contract out of the Statute of Frauds.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, May 24, 1910.* (E. L. C.)

J. Wesley Earhart has appealed from your office decision of November 10, 1909, in which you reverse the action of the local officers and dismiss his contest brought against the homestead entry of Joseph E. Hein, No. 4041, made April 12, 1907, for the W. $\frac{1}{2}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 21, T. 28 N., R. 3 W., Great Falls, Montana, land district. On April 30, 1909, Earhart filed his affidavit of contest against said entry, charging that:

Joseph E. Hein was at the time of making said entry and at all times since has been and is now the owner and proprietor of more than two hundred acres of land besides that embraced in said entry, and that for this reason said entry was fraudulent and void from its inception.

Notice of contest issued and hearing was had before the local officers, at which both parties appeared in person and by counsel and submitted testimony. There is no dispute as to the facts, which are as follows:

On December, 1904, patent was issued by the Government to the defendant for a tract containing 77 acres, which he had purchased as an isolated tract, which tract the contestee still owns and did own at the time of making his present entry.

Some time prior to April 26, 1906, the defendant entered into an agreement with one Leech to purchase a tract of land containing 203 acres, upon which he paid the sum of \$200. This agreement of purchase was oral and it does not appear that any receipt was given for the amount paid. On April 26, 1906, Leech and his wife executed a deed for the said land to defendant, which deed purported to convey title to said land but which was kept in the possession of Leech and not delivered until December, 1907. In the oral agreement between defendant and Leech it was agreed that the deed should be placed with the First National Bank at Great Falls, Montana, and that final payment should be made within one year. Payment was not made within the year and it appears that Leech attempted to sell the land

to other parties. Leech^{*} paid taxes on said land for 1906 and 1907, and it appears exercised control over the same, considering it his land "until it was paid for." It is contended by contestant that the defendant was therefore disqualified to make homestead entry by reason of being the proprietor of more than 160 acres of land, and in support of his contention cites the case of *Leitch v. Moen* (18 L. D., 397), and also the case of *Boyce v. Burnett* (16 L. D., 562). The case at bar is dissimilar to the cases cited, however, in that in those cases the contract under consideration was a contract of purchase in writing and executed, and was therefore an enforceable contract and gave the purchasers an interest in the land, making them the proprietors thereof within the meaning of the statute. In the present case the defendant did not come into possession of the land and his oral agreement was not one that either party could enforce, because declared void by the Statute of Frauds for want of a written memorandum signed by Leech, the party to be charged. He did not purchase the land until more than eight months after he had made his entry. Defendant's agreement was nothing more than an incomplete agreement to purchase at some future date, and not a contract of purchase which vested in him such an equitable interest in the land as would entitle him to compel specific performance of the agreement.

It is well settled in Montana that part payment of purchase money is not such part performance as to take a parol contract for the sale of land out of the statute of frauds. In the case of *Boulder Valley Ditch Mining and Milling Company v. Farnham* (12 Mont. Rep., 1; 29 Pac. Rep., 277), which was a case in ejectment, wherein Barry, defendant's grantor, had purchased two town lots of the plaintiff company and paid a part of the purchase price, the balance to be paid at such time as the company should get patent for the land, the land was subsequently transferred to the defendant and this suit was instituted by the plaintiff to get possession of the land which was then in possession of the defendant. The contract and the part payment of the purchase price by Barry was set up as a defence. The court held (syllabus):

Such person is not entitled to a decree of specific performance, though it be shown that part of the purchase price was paid to the agent of the holder of the legal title, payment of part of the purchase price, unaccompanied by other equities, being insufficient to take a parol contract out of the operation of the statute of frauds.

In this decision, the court cited, with approval, the case of *Parker v. Leeright* (20 Mo., 85) and *Townsend v. Houston* (27 American Dec., 732).

In the case of *Ducie et al. v. Ford* (8 Mont., 233; 19 Pac., 414), which was a case where the specific performance of an oral agreement was in question, plaintiffs had agreed to purchase of defendant

and defendant had agreed to transfer to plaintiffs a one-half interest in a mining claim. Plaintiffs had made a part payment of the purchase price thereon. It was held:

Payment of the purchase money is not sufficient part performance of a verbal contract to convey land to satisfy the Statute of Frauds.

From the language used in these cases, it is clear that in Montana the general rule prevails as to the construction of the Statute of Frauds inhibiting oral contracts for the sale of land. While the deed in this case was made out and signed, it was not delivered to the bank in escrow, but was left with a party who made it out. However, if it had been deposited in the bank, it would not have been sufficient to have taken the contract out of the Statute of Frauds, as the delivery of a deed in escrow does not take an oral contract out of the statute. In the case of *Cooper et al. v. Thomason et al.* (30 Oreg., 161; 45 Pac., 296) it was held that:

A deed deposited in escrow is insufficient to take an oral contract for the sale of land out of the Statute of Frauds, unless such deed contains a memorandum of the agreement.

Also:

Payment of the purchase price is not such part performance of an oral contract to convey land as to overcome the plea of the statute.

From the cases above cited, it is clear that the defendant was not disqualified to make entry of the land involved and your decision reversing the local officers and dismissing said contest was correct, and the same is accordingly affirmed.

FEES FOR CARBON COPIES OF TESTIMONY IN CONTEST CASES.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., May 28, 1910.

REGISTERS AND RECEIVERS,

United States Land Offices.

SIRS: When the reducing of testimony to writing in a contest case is done by regularly appointed employes of your office, carbon copies may be furnished at the rate of 5 cents per page, irrespective of the number of words or figures thereon.

If the testimony is reduced to writing by a clerk employed under authority of the circular of February 15, 1909 (37 L. D., 448), such clerk will be allowed to make a charge of not exceeding 5 cents per

page for each carbon copy, to be collected by him from the party to whom the same is furnished.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

R. A. BALLINGER, *Secretary.*

NORTHERN PACIFIC ADJUSTMENT—DENUDED LAND—ACT OF JULY 1,
1898.

HUSTON *v.* NORTHERN PACIFIC RY. CO.

One claiming lands within the limits of the Northern Pacific grant who, either prior or subsequent to the act of July 1, 1898, providing for the adjustment of conflicting claims of individuals and the company, denuded the land of its timber, which constituted its chief value, does not come within the intent and purpose of the act and is not entitled to have his claim adjusted under its provisions.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, May 31, 1910.* (J. R. W.)

Frank L. Huston appealed from your decision of March 2, 1910, addressed to the local office, Vancouver, Washington, denying his petition in which he asked that you revoke the order for hearings contained in your letter "F" of July 22, 1909, in the following cases:

H. E. 9062, December 13, 1892, Edmund Robertson, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 3, T. 5 N., R. 17 E., F. C. 4898, October 30, 1900; patented May 8, 1901.

C. E. 6784, April 1, 1904, Lucille Bernhardt, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 15, W. $\frac{1}{2}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 22, T. 5 N., R. 17 E.; patented February 4, 1905.

H. E. 11427, August 28, 1900, Samuel A. Swan, E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 9, W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 10, T. 5 N., R. 15 E., commuted 6589 September 21, 1903; patented September 9, 1907.

C. E. 5171, September 11, 1896, Wenzel Borde, E. $\frac{1}{2}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 17, T. 6 N., R. 13 E.; patented December 21, 1906.

That this matter may be properly considered it is necessary to review previous action respecting these cases. Numerous cases had been adjudicated under act of July 1, 1898 (30 Stat., 597, 620), and supplementary act of May 17, 1906 (34 Stat., 197), and other cases were under consideration November 9, 1907, when Britton & Gray, attorneys for Northern Pacific Railway Company, filed a letter alleging that Frank L. Huston, applicant herein, was attempting to transfer claims denuded of their timber, and requesting that you suspend action and investigate eighty-seven such claims listed by them. You declined to investigate the claims or suspend action, and, February 7, 1908, counsel requested the Department to order suspension in the

Huston cases until they could be investigated, and with their letter they listed forty-six cases which had been investigated. The Department issued instructions February 26, 1908 (36 L. D., 283), wherein opinion was expressed that all persons entitled to election under act of July 1, 1898, who, after its passage, placed it beyond their power to return the land to the railroad company in substantially the same condition it was at date of the act, should be held to have elected to retain the land and should not be permitted to relinquish it and make a lieu selection. You were directed to give the railway company full opportunity to apply for hearing and to take no further action looking to adjustment of Huston's pending claim or others of that character.

You ordered hearings July 22, 1909, in the cases above described, on protest filed by the railway company alleging the value of the land involved had been depreciated by cutting of timber. From your refusal to revoke, the hearings were ordered, Huston appealing to the Department.

Appellant insists that it is useless to hold hearings in cases where the facts on which the final decision will be based are matters of record in the Department, or to hold hearings in cases where the final decision will turn on questions of law arising from facts within the official knowledge of the officers rendering the decisions; that it is unfair to put Huston or the present owners of the claims to expense of hearings upon a loose, general, and unverified protest which does not disclose any facts not within knowledge of protestant at the time the individual claimants were called upon to exercise an election, either to relinquish or retain the land in conflict; that the doctrine of estoppel applies in the four cases involved herein, as well as in nine others wherein the order for hearing was revoked by the Department because the relinquishments in these cases were filed at request of the railway company; and, finally, if the railway company believes that timber was removed for speculative purposes after the right of relinquishment was recognized, the company should be required to file an amended protest stating under oath what they claim in relation to the four cases here involved.

Huston does not controvert the rules heretofore established by the Department that the intention of the settler or individual claimant to retain the land may be manifested by acts, as well as words, and that to divest the land of its timber, with intent to relinquish it thus despoiled, would be a manifestation of bad faith. It is earnestly contended that removal of the timber before the passage of the act of 1898 gave the individual claimant a right to relinquish would not manifest any intent or election to retain the land. It is stated that in most cases involving the protest of the company the timber was cut before the right of election was extended by the act of 1898. Therefore, such cutting of timber can not be regarded as an election

to retain the land. In one case it is stated that the timber removed since the act had a value of only twenty-five to fifty dollars, and it is urged this is too small a matter to justify ordering of a hearing. In requesting suspension of action on pending cases, the railway company urged it would be manifest injustice to allow individual claimants to destroy the chief value of the lands involved and thereafter relinquish them to the railway company. The Department upheld that contention, and instructions of February 26, 1908, were issued. The Department held that all persons entitled to an election under act of July 1, 1898, who after its passage had placed it beyond their control to return the land to the railroad company in substantially the same condition it was at date of the act, should be held to have elected to retain it.

It thus appears that the question now presented was not considered by the Department when instructions of February 26, 1908, were issued, and those instructions are not necessarily controlling of the four cases now considered.

In instructions of February 26, 1908, it was held that:

Adjustment implies an equitable settlement and precludes the idea of unfair dealing or the taking of undue advantage by either of the parties thereto. When the object of a statute is plain every rule of construction requires that it be so interpreted and administered as to carry out such object, if this can be accomplished without doing violence to the language of the act.

In its construction of the act, in *Humbird v. Avery* (195 U. S., 499), the court held that the act was one for adjustment of conflicting equities and legal rights, arising from a dispute between the railroad company holding under its grant and occupants and purchasers of the granted land. It noted that:

The disputes had arisen out of conflicting orders or rulings of the land department, and it became the duty of the Government to remove the difficulties which had come upon the parties in consequence of such orders. The settlement of these disputes was, therefore, as the Circuit Court said, a matter of public concern. If the disputes were not accommodated, the litigation in relation to the land would become vexatious, extending over many years and causing great embarrassment. In the light of that situation Congress passed the act of 1898, which opened up a way for an adjustment upon principles that it deemed just and consistent with the rights of all concerned—the Government, the railroad grantee, and individual claimants.

This is the interpretation of the act given by the court "in light of the situation as it actually was at the date of its passage." Congress was not able to divest the railroad company of the title which had been granted and which was superior to the patented titles granted to private individuals. To divest such title, the railroad company must necessarily by some act assent. Without its assent the thing proposed to be accomplished was beyond power of Congress. Had the railroad company not assented, it could recover the legal title and the value of all timber taken from the land. United

States *v.* Anderson, 194 U. S., 394, 399. The act proposed that the railroad company assent to the settler or purchaser claimant retaining his title. It provided that: (1) if the settler or purchaser claimant refuse to transfer his entry to other land, the railroad company should be entitled to select an equal quantity in lieu of it; (2) that the Secretary of the Interior should deliver to the railroad company a list of the tracts that had been purchased or settled upon and that the railroad company might relinquish them to the United States as if the grant had never been made; but if it did relinquish, it might select other lands; and (3) that all qualified settlers or their successors in title, who, prior to January 1, 1898, purchased, settled upon, or claimed in good faith under any law of the United States or ruling of the land department, any part of an odd-numbered section in either the granted or indemnity limits of the grant, "may in lieu thereof transfer their claims to an equal quantity of public lands, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim or not occupied by a settler at the time of such entry, situated in any State or Territory into which said railroad grant extends, and make proof therefor as in other cases provided."

In assenting to this act the railroad company became bound by its terms, but, in view of the Department, is not conclusively bound to accept an inequitable exchange or adjustment. The act is one, as construed by the court, for "adjustment" of conflicting legal and equitable claims. The legal claim was in the railroad company, and it could recover the land and all damage done to the land impairing its value. If it be held that the railroad company must accept the land denuded of timber, it may then pursue the former claimant and all those who participated in denuding it. This would result in the same course of vexatious litigation extending over many years and causing great embarrassment, which the court said it was the intent of the act to avoid. On the other hand, if the settler or claimant who has denuded the land of that which gives it value is held to retain the land, he gets all that he either bargained for or expected, and all equities of adjustment are fully satisfied. If he can relinquish his wasted land and then take another tract equally or better timbered he deprives the railroad company of right to select unwasted land, and unconsonably obtains two values for one entry. That is not the intent of the act. The act is equitable in aspect. It is not a question of *election* strictly speaking, but a question of equitable adjustment. Upon full consideration of the matter, it is now held that it is not within the intent or purpose to permit relinquishment of lands which have been wasted of that which form their chief value, irrespective of whether they were wasted before or after the act in question. There is, therefore, no reason to recall the orders for hearings, and your decision is affirmed.

LAWS AND REGULATIONS RELATING TO THE RECLAMATION OF ARID LANDS BY THE UNITED STATES.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 31, 1910.

STATUTES.

AN ACT Appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all moneys received from the sale and disposal of public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming, beginning with the fiscal year ending June thirtieth, nineteen hundred and one, including the surplus of fees and commissions in excess of allowances to registers and receivers, and excepting the five per centum of the proceeds of the sales of public lands in the above States set aside by law for educational and other purposes, shall be, and the same are hereby, reserved, set aside, and appropriated as a special fund in the Treasury to be known as the "reclamation fund," to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories, and for the payment of all other expenditures provided for in this act: *Provided*, That in case the receipts from the sale and disposal of public lands other than those realized from the sale and disposal of lands referred to in this section are insufficient to meet the requirements for the support of agricultural colleges in the several States and Territories, under the act of August thirtieth, eighteen hundred and ninety, entitled "An act to apply a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture and the mechanic arts, established under the provisions of an act of Congress approved July second, eighteen hundred and sixty-two," the deficiency, if any, in the sum necessary for the support of the said colleges shall be provided for from any moneys in the Treasury not otherwise appropriated.

SEC. 2. That the Secretary of the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion, and development of waters, including artesian wells, and to report to Congress at the beginning of each regular session as to the results of such examinations and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom, and all facts relative to the practicability of each irrigation project; also the cost of works in process of construction as well as of those which have been completed.

SEC. 3. That the Secretary of the Interior shall, before giving the public notice provided for in section four of this act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided*, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said land to entry; that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided: *Provided*, That the commutation provisions of the homestead laws shall not apply to entries made under this act.

SEC. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per

acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided*, That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

SEC. 5. That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract, as provided in section 4. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident of such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands entered under this act.

SEC. 6. That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this act: *Provided*, That when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

SEC. 7. That where in carrying out the provisions of this act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to

pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney-General of the United States upon every application of the Secretary of the Interior, under this act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice.

SEC. 8. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

SEC. 9. That it is hereby declared to be the duty of the Secretary of the Interior in carrying out the provisions of this act, so far as the same may be practicable and subject to the existence of feasible irrigation projects, to expend the major portion of the funds arising from the sale of public lands within each State and Territory hereinbefore named for the benefit of arid and semiarid lands within the limits of such State or Territory: *Provided*, That the Secretary may temporarily use such portion of said funds for the benefit of arid or semiarid lands in any particular State or Territory hereinbefore named as he may deem advisable, but when so used the excess shall be restored to the fund as soon as practicable, to the end that ultimately, and in any event, within each ten-year period after the passage of this act, the expenditures for the benefit of the said States and Territories shall be equalized according to the proportions and subject to the conditions as to practicability and feasibility aforesaid.

SEC. 10. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect.

Approved, June 17, 1902 (32 Stat., 388).

An Act Authorizing the use of earth, stone, and timber on the public lands and forest reserves of the United States in the construction of works under the national irrigation law.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in carrying out the provisions of the national irrigation law, approved June seventeenth,

nineteen hundred and two, and in constructing works thereunder, the Secretary of the Interior is hereby authorized to use and to permit the use by those engaged in the construction of works under said law, under rules and regulations to be prescribed by him, such earth, stone, and timber from the public lands of the United States as may be required in the construction of such works, and the Secretary of Agriculture is hereby authorized to permit the use of earth, stone, and timber from the forest reserves of the United States for the same purpose, under rules and regulations to be prescribed by him.

Approved, February 8, 1905 (33 Stat., 706).

An Act to provide for the covering into the reclamation fund certain proceeds of sales of property purchased by the reclamation fund.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be covered into the reclamation fund established under the act of June seventeenth, nineteen hundred and two, known as the reclamation act, the proceeds of the sales of material utilized for temporary work and structures in connection with the operations under the said act, as well as of the sales of all other condemned property which had been purchased under the provisions thereof, and also any moneys refunded in connection with the operations under said reclamation act.

Approved, March 3, 1905 (33 Stat., 1032).

An Act Providing for the withdrawal from public entry of lands needed for townsite purposes in connection with irrigation projects under the reclamation act of June seventeenth, nineteen hundred and two, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior may withdraw from public entry any lands needed for townsite purposes in connection with irrigation projects under the reclamation act of June seventeenth, nineteen hundred and two, not exceeding one hundred and sixty acres in each case, and survey and subdivide the same into town lots, with appropriate reservations for public purposes.

SEC. 2. That the lots so surveyed shall be appraised under the direction of the Secretary of the Interior and sold under his direction at not less than their appraised value at public auction to the highest bidders, from time to time, for cash, and the lots offered for sale and not disposed of may afterwards be sold at not less than the appraised value under such regulations as the Secretary of the Interior may prescribe. Reclamation funds may be used to defray the necessary expenses of appraisal and sale, and the proceeds of such sales shall be covered into the reclamation fund.

SEC. 3. That the public reservations in such townsites shall be improved and maintained by the town authorities at the expense of

the town; and upon the organization thereof as municipal corporations the said reservations shall be conveyed to such corporations by the Secretary of the Interior, subject to the condition that they will be used forever for public purposes.

SEC. 4. That the Secretary of the Interior shall, in accordance with the provisions of the reclamation act, provide for water rights in amount he may deem necessary for the towns established as herein provided, and may enter into contract with the proper authorities of such towns, and other towns or cities on or in the immediate vicinity of irrigation projects, which shall have a water right from the same source as that of said project for the delivery of such water supply to some convenient point, and for the payment into the reclamation fund of charges for the same to be paid by such towns or cities, which charges shall not be less nor upon terms more favorable than those fixed by the Secretary of the Interior for the irrigation project from which the water is taken.

SEC. 5. That whenever a development of power is necessary for the irrigation of lands under any project undertaken under the said reclamation act, or an opportunity is afforded for the development of power under any such project, the Secretary of the Interior is authorized to lease for a period not exceeding ten years, giving preference to municipal purposes, any surplus power or power privilege, and the money derived from such leases shall be covered into the reclamation fund and be placed to the credit of the project from which such power is derived: *Provided*, That no lease shall be made of such surplus power or power privilege as will impair the efficiency of the irrigation project.

Approved, April 16, 1906 (34 Stat., 116).

An Act To extend the irrigation act to the State of Texas.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the act entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two, be, and the same are hereby, extended so as to include and apply to the State of Texas.

Approved, June 12, 1906 (34 Stat., 259).

An Act Providing for the subdivision of lands under the reclamation act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever, in the opinion of the Secretary of the Interior, by reason of market conditions and

the special fitness of the soil and climate for the growth of fruit and garden produce, a lesser area than forty acres may be sufficient for the support of a family on lands to be irrigated under the provisions of the act of June seventeenth, nineteen hundred and two, known as the reclamation act, he may fix a lesser area than forty acres as the minimum entry and may establish farm units of not less than ten nor more than one hundred and sixty acres. That whenever it may be necessary, for the purpose of accurate description, to further subdivide lands to be irrigated under the provisions of said reclamation act, the Secretary of the Interior may cause subdivision surveys to be made by the officers of the Reclamation Service, which subdivisions shall be rectangular in form, except in cases where irregular subdivisions may be necessary in order to provide for practicable and economical irrigation. Such subdivisions surveys shall be noted upon the tract books in the General Land Office, and they shall be paid for from the reclamation fund: *Provided*, That an entryman may elect to enter under said reclamation act a lesser area than the minimum limit in any State or Territory.

SEC. 2. That wherever the Secretary of the Interior, in carrying out the provisions of the reclamation act, shall acquire by relinquishment lands covered by a bona fide unperfected entry under the land laws of the United States, the entryman upon such tract may make another and additional entry, as though the entry thus relinquished had not been made.

SEC. 3. That any townsite heretofore set apart or established by proclamation of the President, under the provisions of sections twenty-three hundred and eighty and twenty-three hundred and eighty-one of the Revised Statutes of the United States, within or in the vicinity of any reclamation project, may be appraised and disposed of in accordance with the provisions of the act of Congress approved April sixteenth, nineteen hundred and six, entitled "An act providing for the withdrawal from public entry of lands needed for townsite purposes in connection with irrigation projects under the reclamation act of June seventeenth, nineteen hundred and two, and for other purposes;" and all necessary expenses incurred in the appraisal and sale of lands embraced within any such townsite shall be paid from the reclamation fund, and the proceeds of the sales of such lands shall be covered into the reclamation fund.

* * * * *

SEC. 5. That where any bona fide desert-land entry has been or may be embraced within the exterior limits of any land withdrawal or irrigation project under the act entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the recla-

mation of arid lands," approved June seventeenth, nineteen hundred and two, and the desert-land entryman has been or may be directly or indirectly hindered, delayed, or prevented from making improvements or from reclaiming the land embraced in any such entry by reason of such land withdrawal or irrigation project, the time during which the desert-land entryman has been or may be so hindered, delayed, or prevented from complying with the desert-land law shall not be computed in determining the time within which such entryman has been or may be required to make improvements or reclaim the land embraced within any such desert-land entry: *Provided*, That if after investigation the irrigation project has been or may be abandoned by the Government, time for compliance with the desert-land law by any such entryman shall begin to run from the date of notice of such abandonment of the project and the restoration to the public domain of the lands withdrawn in connection therewith, and credit shall be allowed for all expenditures and improvements heretofore made on any such desert-land entry of which proof has been filed; but if the reclamation project is carried to completion so as to make available a water supply for the land embraced in any such desert-land entry, the entryman shall thereupon comply with all the provisions of the aforesaid act of June seventeenth, nineteen hundred and two, and shall relinquish all land embraced within his desert-land entry in excess of one hundred and sixty acres, and as to such one hundred and sixty acres retained, he shall be entitled to make final proof and obtain patent upon compliance with the terms of payment prescribed in said act of June seventeenth, nineteen hundred and two, and not otherwise. But nothing herein contained shall be held to require a desert-land entryman who owns a water right and reclaims the land embraced in his entry to accept the conditions of said reclamation act.

Approved, June 27, 1906 (34 Stat., 519).

REGULATIONS.

GENERAL INFORMATION.

1. Section 3 of the act of June 17, 1902 (32 Stat., 388) provides for the withdrawal of lands from all disposition other than that provided for by said act. Lands withdrawn as susceptible of irrigation (usually referred to as a withdrawal of the second form) are subject to entry under the provisions of the homestead law only, and entries thereof are made in practically the same manner as the usual homestead entry, but they are subject to all the provisions, limitations, charges, terms, and conditions of the reclamation act.

2. Registers and receivers will indorse across the face of each homestead application, when allowed under the reclamation act, the

following: "This entry allowed subject to the provisions of the act of June 17, 1902 (32 Stat., 388);" and will advise each entryman of the provisions of the act by furnishing him with a copy of this circular.

3. These entries are not subject to the commutation provisions of the homestead law, and on the determination by the Secretary of the Interior that the proposed irrigation project is practicable, the entries may be reduced in area to the limit representing the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question, and the lands within a project are platted to farm units representing such areas. The farm units may be as small as 10 acres where the lands are suitable for fruit raising, etc., but on most projects, so far, they have been fixed at from 40 to 80 acres each. These areas are announced on farm unit plats, and public notice stating the amount of the charges and other details concerning payment, is issued by the Secretary of the Interior, shortly before the Government is ready to furnish water. Until this public notice is issued it will be impossible in most respects to give definite information as to any particular tract or as to the details intended to be covered by such notice; but registers and receivers will, upon inquiry, give all general information relative to the public lands included in reclamation projects, and will keep the engineers of the Reclamation Service fully informed, by correspondence, as to conditions affecting the same.

WITHDRAWALS AND RESTORATIONS.

4. The withdrawal of these lands at first is principally for the purpose of making surveys and irrigation investigations in order to determine the feasibility of the plans of irrigation and reclamation proposed. Only a portion of the lands will be irrigated even if the project is feasible, but it will be impossible to decide in advance of careful examination what lands may be watered, if any, and the mere fact that surveys are in progress is no indication whatever that the works will be built. It can not be determined how much water there may be available, or what lands can be covered, or whether the cost will be too great to justify the undertaking until the surveys and the irrigation investigations have been completed.

5. There are two classes of withdrawals authorized by the act: One commonly known as "Withdrawals under the first form," which embraces lands that may possibly be needed in the construction and maintenance of irrigation works, and the other commonly known as "Withdrawals under the second form," which embraces lands not supposed to be needed in the actual construction and maintenance of irrigation works, but which may possibly be irrigated from such works.

6. After lands have been withdrawn under the first form they can not be entered, selected, or located in any manner so long as they remain so withdrawn, and all applications for such entries, selections, or locations should be rejected and denied, regardless of whether they were presented before or after the date of such withdrawal. (See John J. Maney, 35 L. D., 250.)

7. Lands withdrawn under the second form can be entered only under the homestead laws and subject to the provisions, limitations, charges, terms, and conditions of the reclamation act, and all applications to make selections, locations, or entries of any other kind on such lands should be rejected, regardless of whether they are presented before or after the lands are withdrawn.

8. Withdrawals made under either of these forms do not defeat or adversely affect any valid entry, location, or selection which segregated and withheld the lands embraced therein from other forms of appropriation at the date of such withdrawal; and all entries, selections, or locations of that character should be permitted to proceed to patent or certification upon due proof of compliance with the law in the same manner and to the same extent to which they would have proceeded had such withdrawal not been made, except as to lands needed for construction purposes. All lands, however, taken up under any of the land laws of the United States subsequent to October 2, 1888, are subject to right of way for ditches or canals constructed by authority of the United States (act of August 30, 1890, 26 Stat., 391; circular approved by Department July 25, 1903). All entries made upon the lands referred to are subject to the following proviso of the act cited:

That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian it shall be expressed that there is reserved from lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States.

9. Should a homestead entry embrace land that is needed in whole or in part for purposes contemplated by said proviso the land would be taken for such purpose, and the entryman would have no claim against the United States for the same.

10. All withdrawals become effective on the date upon which they are ordered by the Secretary of the Interior, and all orders for restorations on the date they are received in the local land office unless otherwise specified in the order. (George B. Pratt et al., 38 L. D., 146.)

11. Upon the cancellation of a homestead entry covering lands embraced within a withdrawal under the reclamation act such withdrawal becomes effective as to such lands without further order. (See Cornelius J. MacNamara, 33 L. D., 520.)

12. Where the Secretary of the Interior by the approval of farm-unit plats has determined, or may determine, that the lands designated thereon are irrigable, the filing of such plats in the General Land Office and in the local land offices is to be regarded as equivalent to an order withdrawing such lands under the second form, and as an order changing to the second form any withdrawals of the first form then effective as to any such tracts. This applies to all areas shown on the farm-unit plats as subject to entry under the provisions of the reclamation act or as subject to the filing of water-right applications. Upon receipt of such plats appropriate notations of the change of form of withdrawal are to be made in accordance therewith upon the records of the General Land Office and of the local land offices.

13. In the event any lands embraced in any entry on which final proof has not been offered, or in any unapproved or uncertified selection, are needed in the construction and maintenance of any irrigation works (other than for right of way for ditches or canals reserved under act of August 30, 1890) under the reclamation act, the Government may cancel such entry or selection and appropriate the lands embraced therein to such use, after paying the value of the improvements thereon and the enhanced value of such lands caused by such improvements.

14. Uncompleted claims to lands withdrawn under the provisions of the reclamation act and determined to be needed for construction of irrigation works in connection with a project that has been found practicable should not be allowed to be perfected, but should remain in the same status as existed at the time the determination was made, and the rights of the claimants adjusted upon the basis of that status. (Opinion of Asst. Atty. General, 34 L. D., 421.) The rights of the entryman as to the measure of compensation and the character of action that may be taken by the Government in acquiring or appropriating the land embraced in his entry must be determined by the status of the entry at the time of the withdrawal of the lands for such purposes. (Agnes C. Pieper, 35 L. D., 459.)

15. Where the owners of the improvements mentioned shall fail to agree with the representative of the Government as to the amount to be paid therefor, the same shall be acquired by condemnation proceedings under judicial process, as provided by section 7 of the reclamation act.

16. Inasmuch as every entry within the limits of a withdrawal under the reclamation act is subject to conformation to an established farm unit, improvements placed upon the different subdivisions by the entryman prior to such conformation are at his risk. (Jerome M. Higman, 37 L. D., 718.) They should be confined to one legal subdivision until the entry is conformed. In readjusting such an

entry the Secretary is not required to confine the farm unit to the limits of the entry, but may combine any legal subdivision thereof with a contiguous tract lying outside of the entry so as to equalize in value the several farm units. (*Idem.*) The act of June 27, 1906, *supra*, authorizes the Secretary of the Interior to fix a lesser area than 40 acres as a farm unit when, "by reason of market conditions and special fitness of the soil and climate for the growth of fruit and garden produce, a lesser area than forty acres may be sufficient for the support of a family" or when necessary "in order to provide for practical and economical irrigation."

ADDITIONAL ENTRIES.

17. A person who has entered and proved up on a farm unit within a project can not make an additional entry of public lands outside of the project, nor can a person who makes entry for a unit of less than 160 acres within a project, after proving up on same, make an additional entry within the same project nor on another project. One who has made entry upon the public domain for less than 160 acres is disqualified from making an additional entry of a farm unit within a reclamation project, which farm unit is the equivalent of a homestead entry of 160 acres of land outside of the reclamation project.

18. Where, however, the first or original homestead entry was made subject to the restrictions and conditions of the reclamation act, any entry additional thereto would be likewise subject to the same restrictions and conditions, and in such cases additional entries may be allowed within reclamation projects under acts authorizing additional entries, except where farm units have been established prior to the filing of the applications. Both entries so allowed are subject to the same adjustment to one farm unit as if the entire tract had been included in the first entry. (*Henry W. Williamson*, 38 L. D., 233.)

CONTESTS.

19. No contest will be allowed against any entry embracing land included within the area of any first-form withdrawal, and in all cases where a contest has been allowed prior to such withdrawal the withdrawal, if made before the termination of the contest or before entry by the successful contestant, will, *ipso facto*, terminate all right that was acquired by reason of such contest.

20. Any entry of land embraced within the area of a second-form withdrawal may be contested, and if at the date of entry by the successful contestant the land is under second-form withdrawal, his entry will be subject to the limitations and conditions of the reclamation act.

CANCELLATION.

21. All persons holding land under homestead entries made under the reclamation act must, in addition to paying the water-right charges, reclaim at least one-half of the total irrigable area of their entries as finally adjusted for agricultural purposes, and reside upon, cultivate, and improve the lands embraced in their entries for not less than the period required by the homestead laws. Any failure to make any two payments when due or to reclaim the lands as above indicated, or any failure to comply with the requirements of the homestead laws and the reclamation act as to residence, cultivation, and improvement, will render their entries subject to cancellation and the money already paid by them subject to forfeiture, whether they have filed water-right application or not.

WIDOWS AND HEIRS OF ENTRYMEN.

22. The widows or heirs of persons who make entries under the reclamation act will not be required both to reside upon and cultivate the lands covered by the entry of the person from whom they inherit, but they must reclaim at least one-half of the total irrigable area of the entry for agricultural purposes as required by the reclamation act and make payment of all unpaid charges when due and before either final certificate or patent can be issued.

23. Upon the death of a homesteader having an entry within an irrigation project, leaving no widow and only minor heirs, his right may, under section 2292, Revised Statutes, be sold for the benefit of such heirs. (See heirs of Frederick C. De Long, 36 L. D., 332.) If in such case the land has been divided into farm units the purchaser takes title to the particular unit to which the entry has been limited, but if subdivision has not been made he will acquire an interest only in the land which would have been allotted to the entryman as his farm unit, in either case taking subject to the payment of the charges authorized by the reclamation act and regulations thereunder and free from all requirements as to residence and cultivation (*idem*).

FINAL PROOF.

GENERAL INFORMATION.

24. All persons who apply to make entry of lands within the irrigable area of any project commenced or contemplated under the reclamation act will be required to comply fully with the homestead law as to residence, cultivation, and improvement of the land, and the failure to supply water from such works in time for use upon the land entered will not justify a failure to comply with the law and to make proof thereof within the time required by the statutes.

25. Persons who have resided upon, cultivated and improved their lands for the length of time prescribed by the homestead laws will not thereafter be required to continue such residence and cultivation, and they may make final proof of reclamation at any time when they can also make proof of the necessary residence, cultivation, and improvement for five years, but no final certificate or patent will issue until all fees, commissions, and construction charges, including operation and maintenance charges due at the time of payment, have been paid in full. The entire building charge and such installments of the operation and maintenance charges as are then due may be paid at any time after the entry has been conformed to a farm unit, and prior to the time on which they otherwise fall due under the terms of the public notice.

26. Soldiers and sailors of the war of the rebellion, the Spanish-American war, or the Philippine insurrection, and their widows and minor orphan children who are entitled to claim credit for the period of the soldier's service under the homestead laws, will be allowed to claim credit in connection with entries made under the reclamation act, but will not be entitled to receive final certificate or patent until all the water-right charges have been paid in full and the requirements as to reclamation have been met.

27. Upon the tendering to registers and receivers of homestead proofs in entries subject to the reclamation act, they will accept only the testimony fees for "reducing testimony to writing and examining and approving testimony," and will not accept final commissions payable under such entries until proof is submitted showing full compliance with all requirements of the act of June 17, 1902, including the payment of all reclamation charges.

28. To establish compliance with the clause of the reclamation act that requires reclamation of at least one-half of the irrigable area of an entry made subject to the provisions of the act, entrymen will be required to make proof by submitting testimony corroborated by two witnesses, showing that the land has been cleared of sagebrush or other incumbrance and leveled, that sufficient laterals have been constructed to provide for the irrigation of the required area, that the land has been put in proper condition and has been watered and cultivated and that the growth of at least one satisfactory crop has been secured thereon.

ENTRIES WITHIN FIRST FORM WITHDRAWAL.

29. When the register and receiver issue final proof notices involving any lands withdrawn under the first form of withdrawal authorized by the reclamation act, they will at once mail a copy of such notice to the engineer in charge of the reclamation project in which the lands are situated, for report, and indorse upon the back of such

notice the following: "For report within thirty days by indorsement hereon as to whether or not the within-described lands or any of them are needed for construction purposes."

30. When they are informed that lands mentioned in the preceding paragraph are needed for construction purposes, final proof may be submitted as in other cases, but the proof should be at once forwarded to the General Land Office, without the issuance of final certificate, together with the report received from the reclamation engineer.

31. If report is received that none of the lands involved are needed for construction purposes, the register and receiver will consider and act on the proof in the same manner as though the lands had not been withdrawn, forwarding with the final papers the report of the reclamation engineer, and noting on the proof, "Lands not needed for construction purposes."

32. If no report is received within the thirty days, the register and receiver will send a new notice by registered mail to the reclamation engineer, allowing him twenty days to make the report referred to in paragraph 30 hereof, and if a report is received, the register and receiver will proceed as indicated in the preceding paragraphs, as the case may be. Should no report be received under this second call, nor the registered letter be returned unclaimed, they will proceed as if report had been received that the lands were not needed.

33. If the registered letter is returned unclaimed all papers will be forwarded to the General Land Office for instructions.

FORWARDING OF PROOFS.

34. When any entryman or the heirs of any entryman apply to make final proof after all of the requirements of the homestead laws as to residence and cultivation have been complied with, the proof offered by them, if found by the register and receiver to be regular, in all cases where all of the charges have not been fully paid, will be forwarded to the General Land Office without the issuance of final certificate.

35. If any final proof offered under this act be irregular or insufficient, the register and receiver will reject it and allow the entryman the usual right of appeal; and if the General Land Office finds any proof forwarded to be fatally defective in any respect, the entryman will be notified of that fact and given an opportunity to cure the defect or to present acceptable proof.

NOTICE TO CONFORM.

36. The registers and receivers are directed to notify, in writing, every person who makes final proof on a homestead entry which is subject to the limitations and conditions of the act of June 17, 1902, embracing land included in an approved farm-unit plat, where the

entry does not conform to an established farm unit, and conformation notice has not already been issued, that thirty days from notice is allowed such entryman to elect the farm unit he desires to retain, in default of which the entry will be conformed by the General Land Office.

REFERENCE TO THE RECLAMATION SERVICE.

37. Before acting on final proof for lands entered subject to the reclamation act, in all cases where no public notice has issued, the Commissioner of the General Land Office will refer such cases to the Director of the Reclamation Service for report as to whether acceptance of proof and issuance of final certificate will conflict with any contemplated reclamation operations.

RESTORATION OF ENTERED LANDS.

38. In such cases covered by the preceding paragraph as embrace lands in a project where the irrigation works will not be ready to furnish water for the irrigation of such land within a reasonable time, the land in question will be relieved from the withdrawal under said act provided the entryman subscribes to the Water Users' Association for the land covered by his entry in such manner as to make the same subject to a lien for the charges fixed under said act.

ACTION ON PROOFS.

39. Notice of acceptance to issue on proof of residence, cultivation, improvement, and reclamation.

Homesteaders who have resided on, cultivated, and improved their lands for the time required by the homestead laws and have reclaimed at least one-half of the irrigable area of their farm units as required by the reclamation act, and have submitted proof which has been found satisfactory thereunder by this office, will be excused from further residence on their lands and a notice will be issued to them reciting that the conditions of residence, cultivation, improvement, and reclamation have been complied with, and that final certificate and patent will issue upon payment of the charges imposed by the public notice issued in pursuance of section 4 of the reclamation act. In such cases, upon payment of the charges by the entryman, or in his behalf, final certificate and patent will issue in due course.

40. Homesteads where residence and improvement have been completed but reclamation not effected.

Homesteaders who have resided on, cultivated, and improved their lands for the time required by the homestead laws, and have submitted proof which has been found satisfactory thereunder by this office, but who are unable to furnish proof of reclamation because water has not been furnished to the lands or farm units not established, will be excused from further residence on their lands and will

be given a notice reciting that further residence is not required, but that final certificate and patent will not issue until proof of reclamation of one-half of the irrigable area of the entry as finally adjusted and payment of all charges imposed by the public notice issued in pursuance of section 4 of the reclamation act.

41. Notice under paragraph 39.

Notice will be given homesteaders by this office, through registers and receivers, under section 39 of this circular; that is, in cases where farm units have been established and the required residence, cultivation, improvement, and reclamation have been established by proof submitted, in the following form:

4-331a.

You are hereby advised that the five-year proof of residence, cultivation, improvement, and reclamation of one-half of the irrigable area, submitted by you on homestead entry No. made, subject to the act of June 17, 1902 (32 Stat., 388), for the section, township, range, meridian, has been examined by this office and found to be sufficient as to residence, improvement, cultivation, and reclamation as required by the homestead and reclamation laws. Further residence on the land is not required in order to obtain patent, and final certificate and patent will issue upon said entry upon payment to the receiver of the local land office of the entire construction charge as fixed by the Secretary of the Interior and the installments of operation and maintenance charges due at time of payment, together with the fees and commissions due.

42. Form of notice in cases falling within paragraph 40.

Notice will be given by this office, through registers and receivers, to homesteaders who have completed the five years' residence, cultivation, and improvement, but because of the fact that water has not been furnished or farm units established are unable to furnish proof of the reclamation of their lands as described in paragraph 40 hereof, in the following form:

4-331.

You are advised that the five-year proof submitted by you on homestead entry No., made subject to the act of June 17, 1902 (32 Stat., 388), for the section, township, range, meridian, has been examined in this office and found to be sufficient as to the residence, cultivation, and improvement required by the ordinary provisions of the homestead law. Further residence on the land is not required in order to obtain patent, and final certificate and patent will issue upon proof that at least one-half of the irrigable area in the entry as finally adjusted has been reclaimed, and that the entire construction charge as fixed by the Secretary of the Interior and the installments of operation and maintenance charges due at the time reclamation is shown and payment is made, together with the fees and commissions due, have been paid to the proper receiving officer of the Government. If this entry does not conform to a farm unit as established by the Department, notice is hereby expressly given that the entry is subject to be conformed and its area thereby reduced.

CONTROL OF SUBLATERALS.

43. The control of operation of all sublaterals constructed or acquired in connection with projects under the reclamation act is

retained by the Secretary of the Interior to such extent as may be necessary or reasonable to assure to the water users served therefrom the full use of the water to which they are entitled. (See 37 L. D., 468.)

WATER RIGHTS FOR LANDS IN PRIVATE OWNERSHIP.

44. Lands which have been patented or which were entered before the reclamation withdrawal may obtain the benefit of the reclamation act, but water-right applications may not be made for more than 160 acres by any one landowner, and such landowner must be an actual bona fide resident on such land or occupant thereof residing in the neighborhood. The Secretary of the Interior has fixed the limit of residence in the neighborhood at a maximum of 50 miles. This limit of distance may be varied, depending on local conditions. A landowner may, however, be the purchaser of the use of water for more than one tract in the prescribed neighborhood at one time, provided that the aggregate area of all the tracts involved does not exceed the maximum limit established by the Secretary of the Interior nor the limit of 160 acres fixed by the reclamation act; and a landowner who has made application for the use of water in connection with 160 acres of irrigable land and sold the same together with the water right, can make other and successive applications for other irrigable lands owned or acquired by him.

VESTED WATER RIGHTS.

45. The provision of section 5 of the reclamation act limiting the area for which the use of water may be sold does not prevent the recognition of a vested right for a larger area and protection of the same by allowing the continued flowing of the water covered by the right through the works constructed by the Government under appropriate regulations and charges.

CORPORATION LANDS.

46. Under dates of February 2, 1909 (37 L. D., 428), and March 3, 1909, the department held, in letters to the Director of the Reclamation Service, under section 5, act of June 17, 1902, with reference to the qualifications of a corporation to acquire a water right in pursuance of the act, that a corporation, otherwise competent, is entitled to take water under the statute, provided its home office is on or in the neighborhood of the land for which it seeks water service.

47. Further, that the corporation must show its stockholders and that as individuals they have not in the aggregate taken water rights that, with that claimed by the corporation, will amount to more than 160 acres or the maximum limit of area established by the Secretary of the Interior. Registers and receivers are accordingly

instructed to be guided by the rulings of the Department, as set forth above, in their action on water-right applications by corporations when presented.

RECLAMATION OF LANDS IN PRIVATE OWNERSHIP.

48. The purpose of the reclamation act is to secure the reclamation of arid or semiarid lands and to render them productive, and section 8 declares that the right to the use of water acquired under this act shall be appurtenant to the land irrigated and that "beneficial use shall be the basis, the measure, and the limit of the right." There can be no beneficial use of water for irrigation until it is actually applied to reclamation of the land. The final and only conclusive test of reclamation is production. This does not necessarily mean the maturing of a crop, but does mean the securing of actual growth of a crop. The requirement as to reclamation imposed upon lands under homestead entries shall therefore be imposed likewise upon lands in private ownership and land entered prior to the withdrawal—namely, that the landowner shall reclaim at least one-half of the total irrigable area of his land for agricultural purposes, and no right to the use of water will permanently attach until such reclamation has been shown. (See 37 L. D., 468.)

CANCELLATION OF WATER RIGHT.

49. The provisions of section 5 of the reclamation act relative to cancellation of entries with forfeiture of rights for failure to make any two payments when due evidently states the rule to govern all who receive water under any project, and accordingly a failure on the part of any water-right applicant to make any two payments when due shall render his water-right application subject to cancellation with the forfeiture of all rights under the reclamation act as well as of any moneys already paid to or for the use of the United States upon any water right sought to be acquired under said act. (37 L. D., 468.)

WATER-RIGHT APPLICATION.

50. The Department has adopted five forms of applications for water rights, viz, Form A (4-021) for homesteaders who have made entries of lands withdrawn under the second form of withdrawal; Form A-1 (4-021a) for homesteaders who are assignees of credits paid by prior entrymen of the same lands; Form B (4-020) for private owners of lands embraced within said project; Form B-1 (4-020a) for private owners of such lands who are assignees of credits paid by prior owners of the same lands; and Form C (4-019) for Indian allottees. Copies of these forms will be furnished registers

and receivers, and they will be used in all applications for water rights in any of the reclamation projects.

51. Upon notice authorized by the Secretary of the Interior that the Government is ready to receive applications for water right for described lands under a particular project, all persons who have made entries of lands under the provisions of the act of June 17, 1902 (32 Stat., 388), will be required to file application for water rights on Form A or Form A-1 for the number of acres of irrigable land in the farm unit entered, as shown by the plats of farm units approved by the Secretary of the Interior.

52. Upon the issuance of such notice private landowners and entrymen whose entries were made prior to withdrawal shall, in like manner, apply for water rights for tracts not containing more than 160 acres of irrigable land, according to the approved plats, unless a smaller limit has been fixed as to lands in private ownership by the Secretary of the Interior. Form B, Form B-1, and Form C are intended for use by such applicants.

53. Each application on Form B, Form B-1, or Form C must contain a statement as to the distance of the applicant's residence from the land for which a water right is desired.

If a greater distance than that fixed for the project is shown in any application, the case should be reported to the Commissioner of the General Land Office for special consideration upon the facts shown. If the applicant is an actual bona-fide resident on the land for which water-right application is made, the clause in parentheses of Form B, Form B-1, or Form C, regarding residence elsewhere, must be stricken out.

54. The applicant on Form B, Form B-1, or Form C must state accurately the nature of his interest in the land. If this interest is such that it can not ripen into a fee-simple title at or before the time when the last annual installment for water right is due, the register and receiver must reject the application.

55. In order to avoid discrepancies in areas and resulting payments and the acceptance of applications for tracts not designated as lands for which water can be furnished, the following instructions are issued:

(a) When practicable, all applications for water rights, both by homesteaders who have made entries of lands withdrawn and by private owners of lands embraced within a reclamation project, should be submitted by the applicants to the project engineer, United States Reclamation Service, for his examination and approval, before the applications are filed in the local land offices. In such cases the project engineers will indorse their approval upon the application forms if found correct, or point out defects and suggest corrections if any are required.

(b) Where, because of lack of time, distance, or necessity of submitting the water-right applications with applications to make original homestead entries, etc., it is not practicable to have the water-right applications examined and approved by the project engineer prior to the filing in the local land office, the water-right applications must be executed and filed in the local land office in duplicate. Registers and receivers will suspend action in such cases and daily forward to the proper project engineer one copy of each of such water-right applications for examination and return by the engineer within fifteen days, approved by him, or with defects indicated and corrections suggested if not in form for approval. In the latter case the applicant should be promptly advised and allowed thirty days to make the necessary amendments, in default of which the application will be rejected.

(c) The Reclamation Service will advise its project engineers that their approval will be regarded as certifying to the correctness of the following matters: (a) That the land described is subject to water-right application under the project; (b) that the irrigable acreage shown is correct in accordance with the public notices, the official plats, and instructions approved by the Secretary of the Interior; (c) that the number of acre-feet per annum to be furnished is correctly stated; (d) that the amount of the building charge is correctly stated; (e) that the number of annual installments is correctly stated.

(d) These regulations are designed to aid the applicants in presenting water-right applications which will be correct in form and which contain matters essential to the approval of their applications; also, to aid the registers and receivers of local land offices in the consideration of such application; and registers and receivers are, therefore, enjoined to use both care and diligence in enforcing the above requirements.

(e) If the Secretary of the Interior has made a contract with a water users' association organized under the project, due notice thereof will be given to the registers and receivers, and applications for water rights should not be accepted in such cases unless the certificate at the end thereof has been duly executed by the said association.

56. The following rules are laid down with reference to water-right applications for land in private ownership, including entries not subject to the reclamation act:

I. Where water-right application is presented covering only part of the irrigable area of a subdivision in private ownership the register and receiver will accept it provided it bears the usual certificates of the project engineer and the local water users' association (where such association has been formed).

II. In case of sale by a private owner of part of the irrigable land covered by a subsisting water-right application, the vendor, in order to have his water-right charges adjusted to the reduced acreage retained by him, will be required to present the following evidence:

(a) Certificate of the proper officer having charge of the county records, showing record of a subscription for stock in the local water users' association covering the land in question and that the land has been duly conveyed by the subscriber at a time subsequent to the recording of the stock subscription.

(b) The certificate of the local water users' association, if one has been organized on the project, under corporate seal, to the effect that proof has been presented to the association of the transfer of the land to the person named and that appropriate transfer has been made on its books of the shares of stock appurtenant to said land.

(c) The vendor should also so arrange that his vendee shall promptly make a water-right application for the irrigable land within the tract conveyed to him, and upon presentation and acceptance of such application appropriate notation of such transfer, with a reference to the new water-right application, will be made on the original or prior water-right application.

III. In case of relinquishment by an entryman, whose entry is not subject to the reclamation act, of a part of the land included in his entry, appropriate notation will be made on his water-right application, showing such relinquishment, and his charges will be reduced accordingly.

IV. Where an entryman relinquishes a part of his entry under conditions described in paragraph III hereof, and the next person who enters the land so relinquished claims credit for installments paid by the first entryman, he must at the time of such entry file with his application to enter evidence showing that he is entitled to such credit; also a water-right application covering the land entered.

57. In order that there may be no unnecessary delay in the obtaining of water by entrymen and landowners in reclamation projects, after they have filed water-right applications and made the required preliminary payment, attention is directed to the instructions issued with each public notice respecting such lands, to the effect that the register and receiver are to issue in triplicate certificates of water-right applications accepted, furnishing one copy to the applicant and mailing one copy to the engineer in charge of the reclamation project, and that at the end of each month they are to prepare a schedule, Form 4-115b, of certificates issued upon water-right applications accepted during the month, and an abstract, Form 4-105b, of collections of charges made during the month, forwarding the original in triplicate to this office and furnishing the Director of the Reclamation Service and the project engineer with copies of each monthly

schedule of certificates and abstract of collections made. Receipts made from the sale of town-site lots should be reported separately on Form 4-105 for payment into the reclamation fund as original receipts on account thereof.

58. *The copies of certificates of water-right applications accepted must be forwarded, on the day issued, to the engineer in charge of the reclamation project wherein the lands are situated, and the monthly abstract of collections must be prepared and copy forwarded to him immediately after the close of the month during which the collections were made.*

59. As above indicated, prompt action is essential in these matters in order that the applicants who are entitled to water may receive same at the *earliest possible moment*; and any dereliction in furnishing the copies of certificates and abstracts above indicated will be considered a failure of satisfactory performance of duty.

WATER-RIGHT CHARGES.

60. The Secretary of the Interior will at the proper time, as provided in section 4 of the reclamation act, fix and announce the area of lands which may be embraced in any entry thereafter made or which may be retained in any entry theretofore made under the reclamation act; the amount of water to be furnished per annum per acre of irrigable land and the charges which shall be made per acre for the lands embraced in such entries and lands in private ownership, for the estimated cost of building the works and for operation and maintenance, and prescribe the number and amount and the dates of payment of the annual installments thereof.

61. The charges assessed against lands entered under this act attach to the lands themselves while so embraced in entries, and as annual installments thereof accrue they become fixed charges on the land in the nature of a lien. If any entry is canceled by reason of relinquishment, all annual installments due and unpaid on the relinquished entry at the date of its cancellation must be paid at the time of filing application to enter by any person who thereafter enters the land.

62. A person who has entered lands under the reclamation act, and against whose entry there is no pending charge of noncompliance with the law or regulations, or whose entry is not subject to cancellation under this act, may relinquish his entry and assign to a prospective entryman any credit he may have for payments already made under this act on account of said entry, and the party taking such assignment may, upon making proper entry of the land and proving the good faith of the prior entryman to the satisfaction of the Commissioner of the General Land Office, receive full credit for all payments thus assigned to him, but must otherwise comply in every respect with the homestead law and the reclamation act.

63. All charges due for operation and maintenance of the irrigation system for all the irrigable land included in any water-right application must be paid on or before April 1 of each year, except where a different date is specified in the orders relating to the particular project, and in default of such payment no water will be furnished for the irrigation of such lands.

REGULATIONS AS TO THE COLLECTION OF RECLAMATION WATER-RIGHT CHARGES BY RECEIVERS OF PUBLIC MONEYS.

64. In accordance with the provisions of section 5 of the reclamation act, all payments of the annual installments of reclamation water-right charges, including the portions for building charges and operation and maintenance charges on reclamation water-right applications, shall be made to the receivers of public moneys of the respective local land districts, *but*, for the convenience of the water-right applicants, the charges provided may be tendered to and received by the designated special fiscal agents for the several irrigation projects for transmission by them to the proper receivers of public moneys. The acceptance of these water-right charges by the fiscal agents of the Reclamation Service can not be held to be a payment to the United States in accordance with the requirements of section 5 of the reclamation act until the moneys are actually in the hands of the proper receivers of public moneys. The permission granted above is only for the convenience of water-right applicants, but care will be taken to properly safeguard the handling of such funds until their receipt by the respective receivers of public moneys.

65. Receivers should not accept a payment for either a part of that portion of the annual installment due representing building charges, or payment of a part of that portion representing operation and maintenance charges. Receivers should accept only tenders which are for the full amount of either portion of the annual installment; but nothing herein contained shall operate to prevent the payment at one time of all installments due. Payment of a part of the amount due on either class of charges should be refused.

66. When full payment is tendered direct to the receiver of public moneys, and upon examination is found to be correct, the receiver will issue the usual receipt.

67. Where payment is tendered through special fiscal agents of the Reclamation Service, and, upon examination, the amounts so transmitted by the special fiscal agent are found to be correct, the receiver will then issue the usual receipt and transmit the same to the water-right applicant at his record post-office address. The receiver will receipt to such special fiscal agent upon one copy (and retain the other copy) of the "Abstract of receipts of reclamation water-right charges (R. S., Form 7-406)" received from the special fiscal agent at the end

of each month. See section 8 of instructions of May 27, 1908, to special fiscal agents, by the United States Reclamation Service.

68. Attention is invited to paragraph 4 of "Circular of instructions to special fiscal agents by the United States Reclamation Service," dated May 27, 1908, and in accordance therewith receivers of public moneys will require payment direct to themselves in all matters involving tenders for fees on homestead entries; tenders for first installments on water-right applications, including both the portion for building and the portion for operation, and maintenance charges where the public notices require the first installment to be paid at the time of filing homestead entries, and tenders upon water-right applications where a notice of contest against the entry upon which the water-right application rests, has been reported by the register of the land office. In all such cases payments must be made direct to the receiver of public moneys.

69. All moneys collected in connection with water-right applications, both those received direct from water-right applicants and through special fiscal agents, must be deposited in receivers' designated depositories to the credit of the Treasurer of the United States "on account of *reclamation fund, water-right charges.*"

DESERT-LAND ENTRIES WITHIN A RECLAMATION PROJECT.

70. By section 5 of the act of June 27, 1906 (34 Stat., 519), it is provided that any desert-land entryman who has been or may be directly or indirectly hindered or prevented from making improvements on or from reclaiming the lands embraced in his entry, by reason of the fact that such lands have been embraced within the exterior limits of any withdrawal under the reclamation act of June 17, 1902, will be excused during the continuance of such hindrance from complying with the provisions of the desert-land laws.

71. This act applies only to persons who have been, directly or indirectly, delayed or prevented, by the creation of any reclamation project or by any withdrawal of public lands under the reclamation act, from improving or reclaiming the lands covered by their entries.

72. No entryman will be excused under this act from a compliance with all of the requirements of the desert-land law until he has filed in the local land office for the district in which his lands are situated an affidavit showing in detail all of the facts upon which he claims the right to be excused. This affidavit must show when the hindrance began, the nature, character, and extent of the same, and it must be corroborated by two disinterested persons, who can testify from their own personal knowledge.

73. The register and receiver will at once forward the application to the engineer in charge of the reclamation project under which the lands involved are located and request a report and recommendation

thereon. Upon the receipt of this report the register and receiver will forward it, together with the applicant's affidavit and their recommendation, to the General Land Office, where it will receive appropriate consideration and be allowed or denied, as the circumstances may justify.

74. Inasmuch as entrymen are allowed one year after entry in which to submit the first annual proof of expenditures for the purpose of improving and reclaiming the land entered by them, the privileges of this act are not necessary in connection with annual proofs until the expiration of the years in which such proofs are due. Therefore, if at the time that annual proof is due it can not be made, on account of hindrance or delay occasioned by a withdrawal of the land for the purpose indicated in the act, the applicant will file his affidavit explaining the delay. As a rule, however, annual proofs may be made, notwithstanding the withdrawal of the land, because expenditures for various kinds of improvements are allowed as satisfactory annual proofs. Therefore an extension of time for making annual proof will not be granted unless it is made clearly to appear that the entryman has been delayed or prevented by the withdrawal from making the required improvements; and, unless he has been so hindered or prevented from making the required improvements, no application for extension of time for making final proof will be granted until after all the yearly proofs have been made.

75. An entryman will not need to invoke the privileges of this act in connection with final proof until such final proof is due, and if at that time he is unable to make the final proof of reclamation and cultivation, as required by law, and such inability is due, directly or indirectly, to the withdrawal of the land on account of a reclamation project, the affidavit explaining the hindrance and delay should be filed in order that the entryman may be excused for such failure.

76. When the time for submitting final proof has arrived, and the entryman is unable, by reason of the withdrawal of the land, to make such proof, upon proper showing, as indicated herein, he will be excused, and the time during which it is shown that he has been hindered or delayed on account of the withdrawal of the land will not be computed in determining the time within which final proof must be made.

77. If after investigation the irrigation project has been or may be abandoned by the Government, the time for compliance with the law by the entryman will begin to run from the date of notice of such abandonment of the project and of the restoration to the public domain of the lands which had been withdrawn in connection with the project. If, however, the reclamation project is carried to completion by the Government and a water supply has been made available for the land embraced in such desert-land entry, the entry-

man must comply with all the provisions of the act of June 17, 1902, and must relinquish all the land embraced in his entry in excess of 160 acres; and upon making final proof and complying with the terms of payment prescribed in said act of June 17, 1902, he shall be entitled to patent.

78. Special attention is called to the fact that nothing contained in the act of June 27, 1906, shall be construed to mean that a desert-land entryman who owns a water right and reclaims the land embraced in his entry must accept the conditions of the reclamation act of June 17, 1902, but he may proceed independently of the Government's plan of irrigation and acquire title to the land embraced in his desert-land entry by means of his own system of irrigation.

79. Desert-land entrymen within exterior boundaries of a reclamation project who expect to secure water from the Government must relinquish all of the lands embraced in their entries in excess of 160 acres whenever they are required to do so through the local land office, and must reclaim one-half of the irrigable area covered by their water right in the same manner as private owners of land irrigated under a reclamation project.

FRED DENNETT,
Commissioner.

Approved:

R. A. BALLINGER,
Secretary.

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Held: That where a tract was entered during the first three months the price thereof was thereby fixed for all time at four dollars per acre, and in event of cancellation of the entry it could not thereafter be again entered except upon payment of such price, regardless of whether the second entry was made during or after the expiration of the first three-month period..... 213

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Held: That where a tract was entered during the first three months the price thereof was thereby fixed for all time at four dollars per acre, and in event of cancellation of the entry it could not thereafter be again entered except upon payment of such price, regardless of whether the second entry was made during or after the expiration of the first three-month period..... 213

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The act of April 23, 1904, providing for the disposition of the Rosebud Indian lands, fixed the price of all lands entered or filed upon within the first three months after opening at four dollars per acre, those entered or filed upon during the second three months at three dollars per acre, and those entered or filed upon after the expiration of six months at two dollars and fifty cents per acre.

Held: That where a tract was entered during the first three months the price thereof was thereby fixed for all time at four dollars per acre, and in event of cancellation of the entry it could not thereafter be again entered except upon payment of such price, regardless of whether the second entry was made during or after the expiration of the first three-month period..... 213

The inadvertent inclusion of a tract of Sioux Indian lands in a homestead entry, at a time when the land was rated at 75 cents per acre, which entry was subsequently amended to describe in lieu of the tract entered the tract actually settled upon and intended to be taken, does not have the effect to fix the price of the erroneously entered tract at 75 cents, the status thereof remaining the same with respect to price as though the erroneous entry had never been made; and where a subsequent entryman was required to pay 75 cents per acre therefor, after the price of all undisposed-of Sioux lands had been reduced to 50 cents, under the belief that the price had been fixed by such previous entry, he is entitled to repayment of the excess..... 313

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Notwithstanding the act of June 5, 1872, opening the lands in the Bitter Root Valley above Lo-Lo Fork to settlement, fixed the price thereof at \$1.25 per acre, the even-numbered sections falling within the primary limits of the grant to the Northern Pacific Railroad Company were, under section 2357 of the Revised Statutes, properly rated at \$2.50 per acre; and an entryman required to pay the higher price is not entitled to repayment of the difference..... 319

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The annual payment of fifteen dollars per mile of road, required by various acts of Congress granting rights of way to railroad companies through the Indian Territory, is not in the nature of compensation, nor a property tax upon the land involved, but is in the nature of a franchise tax or charge upon the business of the corporation constructing the road; and is in no wise affected by the departmental regulation fixing November 1, 1908, as the date prior to which railroad companies might acquire title to the land occupied by them for rights of way, etc. 414

After the State of Oklahoma was admitted into the Union, November 16, 1907, the Indians, as tribes or nations, ceased to own and occupy the lands in the sense in which that expression is used in the acts of Congress fixing the fifteen-dollar charge, and thereafter such charge could not lawfully be exacted. However, the payment for the year ending June 30, 1908, being payable in advance, must be paid in full. 414

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Upon failure to construct within the five-year period, the land department may not, in the face of evidence showing that another is seeking to acquire the land for a legal purpose, waive the requirement of the statute

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with respect to forfeiture, but should recommend the institution of proceedings to have the right declared forfeited. 207

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